situated'" is "not a question of law"); *Watson v. Jimmy John's, LLC*, No. 15 C 6010, 2015 WL 8521293, at *5 (N.D. Ill. Nov. 30, 2015) ("[T]he adequacy of plaintiff's evidentiary showing that he is 'similarly situated'…plainly is not a legal issue").

This Court has held that even if a question is "technically one of law," interlocutory review remains improper if the issue is "heavily freighted with the necessity for factual assessment." *Fannin*, 1989 WL 42583, at *5. That's certainly the case here. Even if the question before this Court *were* a "question of law," "the decision [whether to preliminarily certify a collective] is a fact-intensive one." *Purdham v. Fairfax Cnty. Pub. Schs.*, 629 F. Supp. 2d 544, 552 (E.D. Va. 2009). Determining the proper scope of the district court's notice requires "delving [deeply] into the record," making this case inappropriate for interlocutory review. *Miller*, 2015 WL 7709424, at *2; *LaFleur v. Dollar Tree Stores, Inc.*, No. 2:12–CV–363, 2014 WL 2121721, at *2 (E.D. Va. May 20, 2014).

These principles are vividly illustrated by Maximus' eleventh-hour attempt to supplement the record for appeal with thousands of pages of evidence. D.E. 66 at 1. *See* D.E. 76 at 7. These efforts to thicken up the record should tell this Court all it needs to know about the fact-laden nature of the inquiry. Maximus' own litigation conduct belies any argument that the district court's order presents a clean question of law. *Fannin*, 1989 WL 42583, at *5.

B. The Question Posed By Maximus Is Not "Controlling."

Any question of law within the district court's order is also not "controlling." Maximus seeks review of a question that is not only based on a *conditional* order, but also so abstract and unmoored from the facts of this case that it effectively

demands an advisory opinion. *See B.R. v. F.C.S.B.*, 17 F.4th 485, 493 (4th Cir. 2021) ("Federal courts do not issue advisory opinions.").

"The purpose of section 1292(b) is not to offer advisory opinions rendered on hypotheses which evaporate in the light of full factual development." *Paschall*, 506 F.2d at 406. Maximus asks "what legal standard should be applied" without attempting to show what any particular standard would require or how it might change the scope of this lawsuit. Any claim that a modified legal standard—Maximus studiously avoids advocating for any standard specifically—would change the course of this litigation is a "hypothesis" that may, and likely will, "evaporate in the light of full factual development." *Paschall*, 506 F.2d at 406. Granting Maximus' request would create the precedent that a party may petition this Court to promulgate a "legal standard," in the absence of any actual controversy, U.S. Const. art. III, § 2, for nearly any question under the sun. This is manifestly inappropriate.

Even if Maximus *had* proposed an alternative standard *and* demonstrated that it would materially impact this collective action, resolution of *that* (hypothetical) question still would not be "controlling." A question is not controlling "if the litigation would necessarily continue regardless" of its resolution.[3] *Wyeth v. Sandoz*, 703 F. Supp. 2d 508, 525 (E.D.N.C. 2010). Similarly situated plaintiffs may still opt

[3] Maximus' proposed definition—that a question is "controlling" if its resolution "might save time…and expense"—has been disavowed by this Court: "The mere fact that [the question's] resolution at this time *may* save…effort and expense is not determinative; that of course can be said of any interlocutory appeal." *Fannin*, 1989 WL 42583, at *5. Such a definition "essentially read[s] the 'controlling question of law' requirement out of section 1292(b)." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1982).

into the action by filing written consents, regardless of whether the district court conditionally certifies this case or oversees the sending of notice. *See Branson,* 2021 WL 1550571, at *4; *Waters v. Day & Zimmerman NPS*, 23 F.4th 84, 89 (1st Cir. 2022) ("[O]pt-in plaintiffs become parties to the action without regard to conditional certification."). At least 149 opt-in plaintiffs have already joined the action without judicial intervention. D.E. 1, 9, 10–12, 16, 17, 20, 21, 24, 25, 27, 30–32, 35, 37, 40, 47, 80, 83.

Courts have repeatedly denied interlocutory review of conditional certification orders precisely because they do not "control": such orders are "temporary," "conditional" exercises in case management that can be revised at any time. *See Long v. CPI Sec. Syst., Inc.*, No. 3:12–CV–396–RJC–DSC, 2013 WL 3761078, at *3 (W.D.N.C. July 16, 2013) (collecting cases). Resolving the question posed by Maximus, therefore, would not end this case—or move the ball forward at all. It would merely second- guess the timing, manner, and scope of the district court's notice-giving function—all without regard for whether such second guessing would actually change the course of this litigation. *See Morgan*, 551 F.3d at 1259.

II. THERE IS NO SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

There is no substantial ground for difference of opinion, further undercutting the propriety of interlocutory appeal.

Grounds for difference of opinion "must arise 'out of a genuine doubt as to whether the district court applied the correct legal standard in its order.'" *Va. ex rel. Integra Rec, LLC v. Countrywide Sec. Corp.*, No. 3:14–CV–706, 2015 WL

3540473, at *5 (E.D. Va. June 3, 2015) (quoting *Wyeth*, 703 F. Supp. 2d. at 527). Here, there is no doubt that the district court properly exercised its discretion based on the evidence presented. There is no disagreement—and Maximus does not contend otherwise— about the meaning of the FLSA's phrase "similarly situated," or that courts have authority and discretion under *Hoffman-La Roche* to send notice. There is, at most, some variation among courts about how best to exercise their discretion given the particular features of the cases before them. That does not amount to a substantial difference of opinion on a controlling question of law. *Pack v. Investools, Inc.*, No. 2:09–CV–1042–TS, 2011 WL 2161098, at *2 (D. Utah June 1, 2011) ("[D]ifferent results…from the application of different facts to the same or similar rule of law…do not demonstrate a substantial difference of opinion…under § 1292(b).").

Defendant's contrary argument is premised on the Fifth Circuit's opinion in *Swales v. KLLM Trans. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021), which criticized some elements of the majority two-step framework articulated in *Lusardi*. But these criticisms do not evidence a "substantial difference of opinion."

Swales held that "a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is similarly situated," and observed that "[t]he amount of discovery necessary to make that determination will vary case by case." *Swales*, 985 F.3d at 441. *Swales* urged courts to proceed cautiously and in view of the evidence when managing the notice process. *Id.* But these principles guide district courts' considerable discretion in every circuit. Earlier this year, the First Circuit placed *Swales* squarely in line with prevailing practice rather than recognizing it as a

departure. *See Waters*, 23 F.4th at 89 ("[C]onditional certification…entails a 'lenient' review of the pleadings, declarations, or other limited evidence…to assess whether the 'proposed members of a collective are similar enough to receive notice of the pending action.'" (quoting *Swales*, 985 F.3d at 436)).

Further, *Swales*' criticism of the two-step framework may not even be fairly applicable to this case. *Swales* involved a "potentially dispositive" classification question. *Swales* 985 F.3d at 441. This case does not.

Even if *Swales did* represent a broadly applicable rejection of "conditional certification," it would be an "outlier" in doing so. *Piazza*, 2021 WL 3645526, at *4. A majority of circuit courts have recognized or endorsed *Lusardi*'s two-step approach. *See, e.g.*, *Thiessen*, 267 F.3d at 1105 ("the [two-step] approach is the best of the…approaches"); *Morgan*, 551 F.3d at 1260; *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001); *Myers*, 624 F.3d at 555. Courts are "not bound to find reasonable cause for disagreement whenever authorities lack unanimity." *Wyeth*, 703 F. Supp. 2d. 527 (internal quotation omitted). That is certainly true here.

While the Sixth Circuit has accepted an interlocutory appeal on an order granting conditional certification, *see In re A&L Home Care & Training Ctr.*, No. 21-305, ECF No. 12 (6th Cir. Feb. 4, 2022), that decision offer no meaningful guidance here. Section 1292(b) brings a district court's entire order—not any particular question or issue—under the jurisdiction of the court of appeals. *See U.S. v. Stanley*, 483 U.S. 669, 677 (1987); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Both parties in the Sixth Circuit sought interlocutory review

on multiple issues. It is plausible—indeed likely—that the Sixth Circuit found another issue in the relevant order merited review.

Far from a manifesting a "difference of opinion" on how to determine whether and when to send notice, courts use the two-step approach as the "near-universal" practice. *Swales*, 985 F.3d at 436; *see Myers*, 624 F.3dd 537 at 555 (collecting cases). It is "universal" for good reason: it fairly balances the competing interests identified in *Hoffman- La Roche* and promotes the efficient and just resolution of FLSA actions. There is no substantial ground for difference of opinion warranting an interlocutory appeal.

III. GRANTING THE PETITION WOULD NOT MATERIALLY ADVANCE THE LITIGATION.

An interlocutory appeal would not materially advance this litigation.

An appeal "materially advances" the litigation if a question's resolution "would serve to avoid a trial or substantially shorten the litigation." *In re Trump*, 928 F.3d 360, 371 (4th Cir. 2019). This requirement is not met when a "substantial amount of litigation remains" or "the certified question may be mooted by further proceedings." *Lillehagen v. Allorica*, No. SACV–13–0092–DOC, 2014 WL 2009031, at *7 (C.D. Cal. May 15, 2014); *see Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 622 F.2d 624, 628–29 (2d Cir. 1980).

An immediate appeal would not materially advance the litigation. Quite the opposite: it would only waste judicial resources and delay the ultimate resolution of this case. *See Long*, 2013 WL 3761078, at *4. An interlocutory appeal that affirms the district court's order would create exactly the kind of unnecessary delay that makes courts appropriately skeptical of interlocutory appellate review in the first place. *Microsoft*, 137 at 1712. A reversal or modification of the district court's

order would likewise not save any time or resources at all. The parties would have to conduct the notice process over again, litigate equitable estoppel for a second time, conduct merits discovery, litigate Maximus' decertification motion, engage in dispositive-motion practice, and try the case—with another appeal looming after final judgment. Regardless of the outcome, the interlocutory appeal would multiply the time and expense needed to resolve this litigation. *See Hunter*, 2021 WL 4238991, at *11 ("[R]esolution of [the defendant's] objections to the Certification Order would be resolved…via a decertification motion, placing the litigation in the same posture as if the interlocutory appeal was granted.").

Making matters worse, Maximus seeks to appeal an inherently conditional order. The district court's conditional-certification order could become moot: on a fuller record, the district court might determine that the plaintiffs are *not* similarly situated and simply decertify the collective. *See, e.g., In re New Albertsons*, 2021 WL 4028428, at *2 (noting that conditional certification is a "preliminary, non-final step"). Appellate review of such a tentative decision in no way materially advances the litigation. Any decision by this Court could easily "be mooted by further proceedings." *Lillehagen*, 2014 WL 2009031, at *7.

Unsuprisingly, courts frequently deny interlocutory appeals of conditional-certification orders precisely because they would not "materially advance" anything at all. *See, e.g.*, *Marcum v. Lakes Venture, LLC*, No. 3:19–CV–00231–GNS–LLK, 2021 WL 495857, at *1 (W.D. Ky. 2021) (emphasizing that a court "can always decertify, subclassify, or otherwise alter the class"); *Myers*, 624 F.3d at 555; *Lillehagen*, 2014 WL 2009031, at *7; *Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1072 (D. Ariz. 2015); *O'Donnell v. Robert Half Int'l. Inc.*, 534 F. Supp. 2d 173,

181 (D. Mass. 2008); *Neff v. U.S. Xpress, Inc.*, No. 2:10–cv–948, 2013 WL 5947177, at *3 (S.D. Ohio Nov. 6, 2013); *Long*, 2013 WL 3761078, at *4.

Maximus' proposed appeal will not speed along the litigation. To the contrary, it would materially impede the resolution of this case.

CONCLUSION

For these reasons, Maximus' petition should be denied.

JULIA HAMMOND
236 Concord Ave., Cambridge, MA, 02138 • (860) 395-7663 • jhammond@jd24.law.harvard.edu

Writing Sample

I wrote this sample in November 2022 for a law school course in Advanced Written Advocacy. The assignment was based on a real case in the Eastern District of Wisconsin (Stark Master Fund Ltd., et al v. Credit Suisse Securities LLC, et al). Stark alleged that the defendants, including Credit Suisse and Deutsche Bank, misrepresented the nature of the financing for a proposed merger involving Huntsman Corporation, a company in which Stark had taken a position. Stark alleged that these misrepresentations caused them to retain their stock in Huntsman and purchase additional shares.

Deutsche Bank filed a motion to dismiss the case against them for lack of personal jurisdiction and Plaintiffs submitted a memorandum of law in opposition. Students were asked to draft a reply to Plaintiffs' Opposition on behalf of Deutsche Bank.

This writing sample has not been edited by anyone other than me.

PRELIMINARY STATEMENT

Plaintiffs' Opposition to Deutsche Bank's Motion to Dismiss for Lack of Personal Jurisdiction ("Pl. Opp.") repeatedly distorts the doctrine of personal jurisdiction in an effort to gloss over one critical weakness: they cannot allege *any* Deutsche Bank contacts in Wisconsin giving rise to the claim at the center of their suit. But this Court's personal jurisdiction inquiry will reveal that Deutsche Bank's alleged activities in Wisconsin did not create a reasonable expectation that they would be "haled into court" there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The allegations at the center of this case have nothing to do with Wisconsin. (It's not even clear that Plaintiffs have much at all to do with Wisconsin.) And Deutsche Bank's alleged conduct does not connect it to Wisconsin in any meaningful way.

The Stark Funds appear to agree with Deutsche Bank that this is not one of those "exceptional" cases where an out-of-state defendant may be considered "at home." *See Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014). Deutsche Bank's Wisconsin contacts are a far cry from "constant and pervasive." *Id.* at 751. Consequently, this reply will focus only on specific jurisdiction.

Plaintiffs' theory of their case against Deutsche Bank does not, and cannot, support the conferral of specific personal jurisdiction. Plaintiffs allege that the banks misrepresented their financing commitments in a Commitment Letter to Hexion, supposedly knowing that investors such as Stark would rely on these alleged misrepresentations. Am. Compl. ¶ 91. According to Plaintiffs, the statements in the Commitment Letter to Hexion were designed to deceive all of Huntsman's shareholders, including Stark, into believing Hexion's bid for Huntsman was more secure than it really was Am. Compl. ¶¶ 47, 91. The Commitment Letter that forms the basis of these allegations—like all of Deutsche Bank's activities relating to the proposed Huntsman-

Hexion merger—was negotiated in New York and Chicago. Declaration of Jeffrey T. Welch ("Welch Decl.") ¶ 12. The alleged misrepresentations at the center of the Plaintiffs' complaint are *completely devoid* of any ties to Wisconsin.

Plaintiffs' Opposition confirms their inability to make out a prima facie case in support of personal jurisdiction. The Stark Funds add nothing in support of their claim that the alleged misrepresentations arose out of—or were directed towards—Wisconsin. As such, Stark's allegations do not satisfy the statutory requirements of Wisconsin's long-arm, nor the due process requirements imposed by the Constitution. Expediency and public policy concerns indicate that the exercise of jurisdiction would be unreasonable. And Plaintiffs' last-ditch effort to make a case for the exercise of conspiracy jurisdiction is flimsy—on the law and the facts. Accordingly, the Court should dismiss this action with prejudice as to Deutsche Bank.

ARGUMENT

I. The Stark Funds Cannot Establish That This Court Has Specific, or Case-Linked, Jurisdiction Over Deutsche Bank.

When personal jurisdiction is contested, "the plaintiff bears the burden of demonstrating [its] existence." *See Purdue Rsch. Found. v. Sanofi-Synthelabo, S.A.* 338 F.3d 773, 782 (7th Cir. 2003). Plaintiffs must demonstrate that specific personal jurisdiction satisfies the long-arm statute of the forum state. They must further show that the defendant corporation's "in-state activity is 'continuous and systematic'" *and* "gave rise to the episode-in-suit." *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 923 (2011) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945)). Plaintiffs cannot meet this burden. Even if they could, the exercise of personal jurisdiction would still be unreasonable and in violation of Deutsche Bank's due process rights.

A. Wisconsin's Long-Arm Statute Does Not Authorize Personal Jurisdiction Over Deutsche Bank.

Plaintiffs offer two possible jurisdictional hooks under Wisconsin's long-arm statute. Pl. Opp. at 9. Neither applies to these allegations against Deutsche Bank.

First, Deutsche Bank's alleged behavior is not a "Local Act." While statements directed toward a state may in some circumstances constitute a "Local Act" under Wis. Stat. § 801.05(3), Deutsche Bank's allegedly fraudulent communications with Hexion were not Wisconsin-directed statements. (See I.B.1, *infra*, for further discussion on this subject.) Plaintiffs claim that *other* communications between Deutsche Bank and Stark—communications that have nothing to do with the allegedly wrongful conduct forming the basis for this suit—provide the requisite hook for personal jurisdiction under § 801.05(3). However, this claim rests on a mischaracterization of Plaintiffs' chosen authority. Plaintiffs suggest that *Felland v. Clifton* authorizes the exercise of jurisdiction over all defendants who engage in "Wisconsin-directed communications," Pl. Opp. at 10 (citing 682 F.3d 665, 679 (7th Cir. 2012), but it does not. Rather, the *Felland* court held that Clifton's communications (a "series" of "intentional misrepresentations designed to deceive") could be considered "local acts" *because* they were "part of the wrongful conduct that form[ed] the basis of the claim." *Felland*, 682 F.3d at 679 (7th Cir. 2012). Plaintiffs have not alleged that Deutsche Bank's communications with Stark were part of a series of intentional misrepresentations; to the contrary, they are not at all a part of the allegedly wrongful conduct that forms the basis of the claim.

Second, Plaintiffs claim that Deutsche Bank's alleged provision of services in Wisconsin justifies the exercise of personal jurisdiction under the "Local Injury, Foreign Act" provision of the long-arm statute, Wis. Stat. § 801.05(4). This provision is inapplicable for two reasons. Stark's alleged injuries are financial, making it difficult to "locate" them in any physical place. The Wisconsin Supreme Court has not yet determined whether "financial injury alone" can "constitute 'injury to person or property'" under § 801.05(4). *Hous. Horizons, LLC v. Alexander Co.*, 606 N.W.2d 263, 265 n.4 (Wis. Ct. App. 1999). Stark suggests that *Felland* provides support for the

exercise of personal jurisdiction under § 801.05(4) for solely financial injuries, Pl Opp. at 11 n.2 (citing 682 F.3d at 672), but again, this argument mischaracterizes the law. In *Felland*, the Seventh Circuit found that jurisdiction was proper under § 801.05(3) (the "local act" provision), not §801.05(4). The court there had no need to identify any "location" for a financial injury. *See id.* Even assuming for the sake of argument that § 801.05(4) applies to purely financial injuries, Plaintiffs have provided this Court with no basis for inferring that the alleged injury can fairly be considered "local" to Wisconsin. The Plaintiffs are British Virgin Islands corporations. This Court must accept all facts as true at this stage, *Felland*, 682 F.3d at 676, but need not readily accept Plaintiffs' unsupported legal argument that their alleged injuries were local to Wisconsin.

B. Personal Jurisdiction Is Constitutionally Improper Because Deutsche Bank Has Not Purposefully Availed Itself of the Forum Through Contacts that Give Rise to the Lawsuit.

Even if this Court were to find that these allegations fall within the purview of the Wisconsin long-arm, they would still fail Constitutional standards. Due process concerns mandate that this Court ask "not where the plaintiff experienced a particular injury…but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden v. Fiore*, 571 U.S. 277, 290 (2014); *see also Kinetic Co. v. BDO EOS Svetovanje*, 361 F.Supp.2d 878, 885 (E.D. Wis. 2005) (Randa, J.) (emphasizing that the defendant must have "purposefully availed itself of the privilege of conducting activities in the forum state"). In this case, the answer to that question is a resounding "no."

1. The Alleged Misrepresentations Contained in The Commitment Letter Were Not Purposefully Directed at Wisconsin.

In determining whether a defendant has purposefully availed itself of a forum state, this Court "analyzes only those contacts from which the cause of action arises." *Kinetic*, 361 F.Supp.2d at 886. If a defendant does not deliberately target a forum state, a court may not exercise specific jurisdiction over that defendant. *See Walden*, 571 U.S. at 291; *Tamburo v. Dworkin*, 601 F.3d 693,

702 (7th Cir. 2010) (focusing the contacts inquiry on "whether the conduct underlying the claims was purposely directed at the forum state"). This cause of action arises out of the Banks' allegedly fraudulent communications with Hexion regarding its merger with Huntsman. Am. Compl. ¶¶ 1, 91. Deutsche Bank did not purposely direct its communications with Hexion—a New Jersey company headquartered in Ohio—toward Wisconsin. Nor did Deutsche Bank deliberately target Wisconsin through its purported knowledge that information had been publicly broadcasted in the financial press. Pl. Opp. at 1. Similarly, making something publicly available on the internet by filing it—from an office in New York, Welch Decl. ¶ 12—for public access by interested parties hardly constitutes deliberate targeting of Wisconsin.

2. The Prime Brokerage Relationship Is an Insufficient Basis for Jurisdiction in Wisconsin.

Deutsche Bank's "suit-related conduct" conduct does not create a "substantial connection" with the forum state. *Walden*, 571 U.S. at 284. In an effort to argue that such a connection exists, Plaintiffs attempt to bootstrap their allegations of misrepresentation—activities that by their own account happened entirely outside Wisconsin—onto Deutsche Bank's alleged prime brokerage relationship with Plaintiffs. Pl. Opp. at 3. For several reasons, this alleged relationship does not establish sufficient minimum contacts for the exercise of personal jurisdiction. *See Int'l Shoe*, 326 U.S. at 316.

The alleged prime brokerage relationships cannot serve as an alternative basis for personal jurisdiction in the absence of a showing by Plaintiffs that the alleged conduct at the center of this suit—the claimed misrepresentations directed to Hexion—is Wisconsin-based or Wisconsin-directed. "[A] defendant['s] relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U.S. at 286. Deutsche Bank has no meaningful relationship with Wisconsin: it has no physical presence, no employees, no office, no bank

account, and no property (leased or owned) there. Welch Decl. ¶¶ 6-7. In a footnote, Stark tosses in allegations that Deutsche Bank "referenc[ed] Huntsman" in emails with other Wisconsin investors. Pl. Opp. at 4. However, "[d]ue process requires that a defendant be haled into court…based on *his own affiliations with the State*, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 571 U.S. at 286. Plaintiffs plead no facts suggesting that Deutsche Bank provided any services or interacted with Wisconsin for any reason other than its alleged relationship with the plaintiffs. Deutsche Bank's emails with apparently random investors, fortuitously located in Wisconsin, on a topic bearing at best an attenuated connection to the allegations underlying this suit, do not bolster Stark's claims.

3. The Alleged Communications Between Stark and Deutsche Bank Did Not Give Rise to This Suit.

Even if a prime brokerage relationship constituted an "affiliation" with the state of Wisconsin, *Walden*, 571 U.S. at 286, such a relationship would still not be sufficient to establish personal jurisdiction: Deutsche Bank's alleged communications with Stark as its prime broker did not "give rise" to the injuries described in the complaint.[1] Am. Compl. ¶¶ 87-88. Deutsche Bank did not make *any misrepresentations* to Stark, during its alleged prime brokerage communications or otherwise. Welch Decl. ¶ 13. Deutsche Bank did not solicit the Stark Funds in Wisconsin concerning Huntsman, the proposed Huntsman-Hexion merger, or its financing. Welch Decl. ¶ 13. Rather, Plaintiffs claim that Deutsche Bank's "sales activities in the summer of 2007" caused injury, Pl. Opp. at 13, suggesting that Deutsche Bank breached a duty to Stark in another way.

Stark also was not injured as a result of any material "omissions" by Deutsche Bank—and any claims to the contrary are entirely misplaced. Plaintiffs included only a conclusory statement

[1] Plaintiffs claim lost merger consideration and a decreased stock price after the collapse of the merger. Am. Compl. ¶¶ 87-88.

about Deutsche Bank's supposed "duty to speak" in their Amended Complaint and therefore have alleged no such duty. Am. Compl. ¶ 98. They further expressly acknowledge that Deutsche Bank was not acting as a fiduciary or advisor, and was not rendering any opinions: therefore, there could be no reasonable expectation of disclosure. Maugeri 12(b)(6) Decl. Exs. 14-15 ¶ 18; Baron Decl. Exs. 7-8 § 13. Necessarily, then, Plaintiffs' allegations that Deutsche Bank "perpetuated the fraudulent scheme" through its communications with Stark, Pl. Opp. at 17, fails: Plaintiffs state no basis for their claim that these alleged communications are fraudulent at all.

C. Plaintiffs' Allegations of Conspiracy Jurisdiction are Unsupported by the Facts And Ungrounded In the Law

At the end of their Opposition, Plaintiffs tack on an argument for conspiracy jurisdiction. Pl. Opp. at 19. This argument is unsupported by the facts and ungrounded in the law. This Court refuses to apply conspiracy jurisdiction where it has found that jurisdiction does not otherwise comport with due process. *Kuraki Am. Corp. v. Dynamic Int'l. Wis., Inc.*, Nos. 14-C-582, 14-C-628, 2014 WL 6834226, at *2 (E.D. Wisc. Dec. 3, 2014). This Court considers such an application an impermissible "bypass[ing]" of the due process analysis. *See id.* As explained above, the exercise of personal jurisdiction does not comport with due process in this case—and turning to a conspiracy theory of jurisdiction would stretch the limits of due process even further. There is no connection between Deutsche Bank, Wisconsin, and the events giving rise to this litigation extending beyond Deutsche Bank's relationship with Stark.

No Wisconsin court has determined that it is proper to confer specific personal jurisdiction under a conspiracy theory under the state's long-arm statute. *See Insolia v. Philip Morris Inc.*, 31 F. Supp. 3d 660 (W.D. Wis. 1988). Plaintiffs argue that the Wisconsin Supreme Court has suggested this sort of conferral of jurisdiction might be proper under the state's long-arm, Pl. Opp. at 22 (citing *Rasmussen v. Gen. Motors Corp.*, 355 Wis. 2d 1, 17 (2011)), but their analysis is

misleading. In *Rasmussen*, the Wisconsin Supreme Court indicated its support—consistent with the language of the long-arm statute—that "the acts of an *agent* may support specific personal jurisdiction over a nonresident defendant." 355 Wis. 2d 1, 17 (2011) (emphasis added). Plaintiffs conflate the terms "agent" and "co-conspirator," claiming that the Wisconsin long-arm also supports jurisdiction over "co-conspirators," though such language is nowhere to be found in the statute. Pl. Opp. at 22.

Even if the law *did* support the exercise of conspiracy jurisdiction, Plaintiffs have not properly alleged sufficient facts to support an actionable conspiracy. Deutsche Bank did not solicit, or make any representations to, the Stark Funds in connection with the Huntsman-Hexion matter. Welch Decl. ¶ 13. No evidence has been offered to support the claim that Deutsche Bank had any involvement in Credit Suisse's alleged purchase or sale of MatlinPatterson shares.

D. The Exercise of Specific Jurisdiction Would Be Unreasonable Because It Would Not Comport with Traditional Notions of Fair Play and Substantial Justice.

Plaintiffs have not carried their burden of demonstrating that suit-related conduct in Wisconsin satisfies the "purposeful availment" test. *Kinetic Co. v. BDO EOS Svetovanje*, 361 F.Supp.2d 878, 885. In any event, the unreasonable exercise of personal jurisdiction *always* violates due process. *See Daimler*, 571 U.S. at 139 n.20. Here, Deutsche Bank must make only a minimal showing of unreasonableness under the five *Asahi* factors. *Asahi Metal Indus. Co. v. Super. Ct. Cal.*, 480 U.S. 102, 113 (1987); *see Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) ("the weaker the plaintiff's showing…the less a defendant need show in terms of unreasonableness to defeat jurisdiction").

The Stark Funds argue that Deutsche Bank's goal is to prevent Stark from having its day in court, *see* Pl. Opp. at 19, but this could not be further from the truth. Dismissing this suit for lack of personal jurisdiction serves the interstate judicial system's interest in obtaining the most

efficient resolution of this controversy. It also serves the fundamental substantive social policy against forum-shopping. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965). This controversy has already been litigated, relitigated, and litigated again. This suit was filed in Wisconsin, on behalf of British Virgin Islands corporations, one day after MatlinPatterson lost its suit on these facts in Texas and five days before the expiration of Wisconsin's six-year statute of limitations for fraud claims. *See* Wis. Stat. § 893.93(1)(b). It was filed by the same attorneys who represented MatlinPatterson in Texas. It is a veritable carbon copy of the MatlinPatterson action. A common-sense interpretation of this history indicates that this controversy has already been resolved, and that the interests of judicial economy and the policy against forum-shopping support dismissal.

Exercising personal jurisdiction in the manner advocated by Stark would undermine the substantive social policy promoted by personal jurisdiction doctrine itself—opening the courts to floods of frivolous litigation and excessively burdening financial institutions across the United States. For example, extending personal jurisdiction to every state where a party might access information about an important financial player (whether through government filings or the financial press), and rely on that information to their detriment, may very well undermine the entire notion of personal jurisdiction. Extending personal jurisdiction to every state where a financial institution might be registered as a broker-dealer, whether or not the institution's conduct bears any relation to the subject matter of a lawsuit, could cause much the same result.

CONCLUSION

For the foregoing reasons, Plaintiff's Second Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

Julia Hammond

Applicant Details

First Name	**Alexander**
Middle Initial	**J**
Last Name	**Hartman**
Citizenship Status	**U. S. Citizen**
Email Address	**alexhartman@law.gwu.edu**
Address	**Address** Street **825 New Hampshire Ave NW Apt 208** City **Washington** State/Territory **District of Columbia** Zip **20037** Country **United States**
Contact Phone Number	**7049032020**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**December 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Federal Circuit Bar Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Pro Se**

Recommenders

Dickinson, Laura
ldickinson@law.gwu.edu
Pont, Erika
epont@law.gwu.edu
Kedian, Katie
kkedian@law.gwu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEXANDER HARTMAN

825 New Hampshire Ave NW, Apt 208, Washington, DC 20037 | (704) 903-2020 | alexhartman@law.gwu.edu

June 22, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia, Norfolk Division
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at The George Washington University Law School writing to apply for a 2024–25 clerkship and, alternatively, for any future clerkship terms for which you may be hiring. Having served as a judicial intern in two other federal jurisdictions, I would cherish the opportunity to return to the judiciary to serve as a clerk in the Eastern District of Virginia. I am particularly eager to serve in your chambers given your background in public service.

As an aspiring federal litigator with extensive legal research and writing experience, I am confident I would make a meaningful addition to your chambers. In my two federal judicial internships, I gained extensive in-chambers collaboration skills and developed strong relationships with clerks and judges which solidified my desire to pursue a clerkship. I have developed a professionalized approach to legal research and writing both in the judiciary and as an intern in various government agencies.

I look forward to discussing how I can apply these skills and qualifications to your chambers. Enclosed please find my resume, writing sample, and transcripts. My writing sample is a bench memorandum I wrote for Judge Kelly. Finally, letters of recommendation from Professors Pont, Kedian, and Dickinson are included. Thank you for your consideration.

Sincerely,

Alex Hartman

ALEXANDER HARTMAN

825 New Hampshire Avenue NW, Apt 208, Washington, DC 20037 | (704) 903-2020 | alexhartman@law.gwu.edu

EDUCATION

The George Washington University Law School — **Washington, DC**
Juris Doctor Candidate — Expected May 2024
GPA: 3.700; *George Washington Scholar* (Top 1–15% of class, as of Spring 2023)
Journal: *Federal Circuit Bar Journal* (Notes Editor, 2023–24)
Honors: Dean's Recognition for Professional Development
Activities: Writing Fellow (2023–24); Law School Tutor (Contracts, Property, Criminal Law); Space Law Society (Founding Member); National Security Law Association; International Law Society; Moot Court and Mock Trial Competitions

The University of North Carolina at Chapel Hill — **Chapel Hill, NC**
B.A. in Political Science; Germanic and Slavic Languages and Literatures — Dec. 2020
GPA/Honors: 3.857; *Degree with Highest Distinction*
Thesis: *Die Theaterrolle von ehrenhaften Tod in dem NS-Totenkult Deutschlands*
Study Abroad: Ruprecht-Karls-Universität Heidelberg, Heidelberg, Germany (Spring 2019)

PROFESSIONAL EXPERIENCE

United States Department of Justice, National Security Division — **Washington, DC**
Legal Intern, Foreign Investment Review Section — Fall 2023

United States Office of Special Counsel — **Washington, DC**
Legal Intern, Investigation and Prosecution Division — May 2023 – Present
- Conduct legal research to support prosecutions of whistleblower reprisals and other prohibited personnel practices
- Draft compliance memoranda for federal agencies and briefs for prosecutions before the Merit Systems Protection Board
- Interview complainants to compile facts for investigation reports

United States Attorney's Office — **Washington, DC**
Legal Intern, National Security Section — Jan. 2023 – April 2023
- Conducted legal research and drafted legal memoranda regarding international terrorism, export control violations, threats against high-ranking public officials, extraterritorial violence, and other sensitive matters
- Assisted federal prosecutors in drafting motions and preparing for trial and hearings

United States District Court for the District of Columbia — **Washington, DC**
Judicial Intern for the Hon. Timothy J. Kelly — Sept. 2022 – Nov. 2022
- Composed draft opinions regarding environmental regulation disputes and employment discrimination cases
- Drafted bench memoranda and conducted legal research regarding cross motions for summary judgment in an APA case and motions to dismiss in seditious conspiracy and FOIA cases
- Observed criminal and civil jury trials, sentencings, and other court proceedings

United States Court of Federal Claims — **Washington, DC**
Judicial Intern for the Hon. Kathryn C. Davis — May 2022 – July 2022
- Wrote a judicial opinion analyzing pro se claims of military disability retirement pay
- Conducted legal research and drafted legal memoranda regarding government contracts, federal procurement law, Indian law, and federal tax violations

SKILLS | INTERESTS

- Fluent in German, Eagle Scout | Fall 2022 VOLO Soccer Champion, learning popular but overplayed guitar covers

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G31671363
Date of Birth: 17-JUN

Date Issued: 05-JUN-2023

Record of: Alexander J Hartman

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: ALEXANDER HARTMAN
ALEXHARTMAN@GWU.EDU

REFNUM:5600792

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6202	Contracts Chatman	4.00	A
LAW 6206	Torts Schoenbaum	4.00	B
LAW 6212	Civil Procedure Smith	4.00	B+
LAW 6216	Fundamentals Of Lawyering I Pont	3.00	A-
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.489		
	CUM 15.00 GPA-Hrs 15.00 GPA 3.489		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16%-35% OF THE CLASS TO DATE		
Spring 2022			
	Law School		
	Law		
LAW 6208	Property Nunziato	4.00	A
LAW 6209	Legislation And Regulation Schaffner	3.00	A
LAW 6210	Criminal Law Cottrol	3.00	A
LAW 6214	Constitutional Law I Morrison	3.00	B
LAW 6217	Fundamentals Of Lawyering II Pont	3.00	A-
	Ehrs 16.00 GPA-Hrs 16.00 GPA 3.750		
	CUM 31.00 GPA-Hrs 31.00 GPA 3.624		
	Good Standing		
	DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16%-35% OF THE CLASS TO DATE		

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
	Law School		
	Law		
LAW 6520	International Law Steinhardt	4.00	A
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Ortiz	2.00	A-
LAW 6870	National Security Law On Dickinson	3.00	A
	Ehrs 12.00 GPA-Hrs 9.00 GPA 3.926		
	CUM 43.00 GPA-Hrs 40.00 GPA 3.692		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1%-15% OF THE CLASS TO DATE		
Spring 2023			
LAW 6230	Evidence	4.00	B+
LAW 6360	Criminal Procedure	4.00	A
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	3.00	CR
LAW 6893	Disinfo, Natsec, & Cybersec	2.00	A
	Ehrs 13.00 GPA-Hrs 10.00 GPA 3.733		
	CUM 56.00 GPA-Hrs 50.00 GPA 3.700		
	Good Standing		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1% - 15% OF THE CLASS TO DATE		
Fall 2022			
	Law School		
	Law		
LAW 6657	Fed Circuit Bar Jrnl Note Credits In Progress:	1.00 1.00	----------
Spring 2023			
LAW 6657	Fed Circuit Bar Jrnl Note Credits In Progress:	1.00 1.00	----------

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G31671363
Date of Birth: 17-JUN

Date Issued: 05-JUN-2023

Record of: Alexander J Hartman

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2023			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
LAW 6640	Trial Advocacy	3.00	----------
LAW 6666	Research And Writing Fellow	2.00	----------
LAW 6882	Foreign Intel Surv Act (Fisa)	2.00	----------
LAW 6883	Counterintelligence Law&Policy	2.00	----------
LAW 6886	Domestic Terrorism	2.00	----------
	Credits In Progress:	13.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	56.00	50.00	185.00	3.700
OVERALL	56.00	50.00	185.00	3.700

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM
All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School
Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B*, Good; *C*, Satisfactory; *D*, Low Pass; *F*, Fail; *I*, Incomplete; *IPG*, In Progress; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *P*, Pass; *NP*, No Pass; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added: *A-, B+, B-, C+, C-, D+, D-*.
Effective Summer 1980: The grading symbols: *P*, Pass, and *NP*, No Pass, replace *CR*, Credit, and *NC*, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A*, Excellent; *B*, Good; *C*, Minimum Pass; *F*, Failure; *I*, Incomplete; *IPG*, In Progress; *CR*, Credit; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-*, Good; *C+, C, C-*, Passing; *D*, Minimum Pass; *F*, Failure; *CR*, Credit; *NC*, No Credit; *I*, Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP*, High Pass; *P*, Pass; *F*, Failure; *IP*, In Progress; *I*, Incomplete; *CN*, Conditional; *W*, Withdrawal; *X*, Exempt, *CN/P*, Conditional converted to Pass; *CN/F*, Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

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THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

University Registrar

RAISED SEAL NOT REQUIRED

Name: **Hartman,Alexander Joseph**
Student ID: **730152095**

Birthdate: 06/17/1999
Print Date: 04/03/2023

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 12/13/2020
Degree Honors: Highest Distinction
Major: College of Arts and Sciences
Political Science

Second Major: Germanic and Slavic Languages and Literatures

Sub-Plan: Option: Germanic and Slavic Languages and Literatures: German Media, Arts, and Culture

Test Credits

Test Credits Applied Toward AS Bachelor

2017 Fall

Course		Description	Earned
ENGL	110	CREDIT FOR AP ENGL LANG TEST	3.000
HIST	152	EUROPEAN HISTORY SINCE 1650	3.000
HIST	128	AM HIST SINCE 1865	3.000
HIST	----	HIST GENERAL ELECTIVE	3.000
MATH	110P	ALGEBRA	0.000
MATH	129P	PRECALCULUS MATHEMATICS	0.000
MATH	231	CALC FUNC ONE VAR I	4.000
PSYC	101	GENERAL PSYCHOLOGY	3.000
		Test Transfer Totals:	19.000

Academic Program History

Program: AS Bachelor
04/20/2017: Active in Program
04/20/2017: College of Arts and Sciences
Political Science Major

Program: AS Bachelor
04/12/2018: Active in Program
04/12/2018: College of Arts and Sciences
Political Science Major
04/12/2018: German Minor

Program: AS Bachelor of Arts
01/09/2019: Active in Program
01/09/2019: College of Arts and Sciences
Political Science Major
01/09/2019: German Minor

Program: AS Bachelor of Arts
02/19/2020: Active in Program
02/19/2020: College of Arts and Sciences
Political Science Major
02/19/2020: Germanic and Slavic Languages and Literatures
Second Major
Germanic and Slavic Languages and Literatures:
German Media, Arts, and Culture Option

Beginning of Undergraduate Record

2017 Fall

Course		Description	Attempted	Earned	Grade	Points
ANTH	101	GEN ANTHROPOLOGY	3.000	3.000	A-	11.100
GERM	102	ADV ELEMENTARY GERMAN	4.000	4.000	A-	14.800
POLI	100	INTRO TO GOVT IN US	3.000	3.000	A	12.000
POLI	150	INTERN REL WRLD POL	3.000	3.000	B+	9.900
POLI	209	ANALYZING PUBLIC OPINION	3.000	3.000	A-	11.100

			Attempted	Earned	GPA Units	Points
Term GPA	3.681	Term Totals	16.000	16.000	16.000	58.900
Cumulative GPA	3.681	Cum Totals	16.000	35.000	16.000	58.900

Academic Standing Effective 12/15/2017: Good Standing

2018 Spring

Course		Description	Attempted	Earned	Grade	Points
ENGL	105	ENG COMP & RHETORIC	3.000	3.000	A	12.000
GEOL	101	PLANET EARTH	3.000	3.000	A	12.000
GERM	203	INTERMEDIATE GERMAN	3.000	3.000	A	12.000
LFIT	113	LIFE FITNESS: WEIGHT TR	1.000	1.000	A	4.000
POLI	208	POLIT PART & ELECT	3.000	3.000	A	12.000
POLI	239	INTRO EUROPEAN GOVT	3.000	3.000	A-	11.100

			Attempted	Earned	GPA Units	Points
Term GPA	3.944	Term Totals	16.000	16.000	16.000	63.100
Cumulative GPA	3.813	Cum Totals	32.000	51.000	32.000	122.000

Term Honor: Dean's List

Academic Standing Effective 05/08/2018: Good Standing

2018 Fall

Course		Description	Attempted	Earned	Grade	Points
CLAS	122	THE ROMANS	3.000	3.000	A	12.000
ECON	101	ECON: INTRO	3.000	3.000	B	9.000
GEOL	101L	PLANET EARTH LAB	1.000	1.000	A-	3.700
GERM	204	ADV INTERMEDIATE GERMAN	3.000	3.000	A	12.000
POLI	202	THE U S SUPREME COURT	3.000	3.000	A-	11.100

			Attempted	Earned	GPA Units	Points
Term GPA	3.677	Term Totals	13.000	13.000	13.000	47.800
Cumulative GPA	3.773	Cum Totals	45.000	64.000	45.000	169.800

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

University Registrar

RAISED SEAL NOT REQUIRED

Name: **Hartman,Alexander Joseph**
Student ID: **730152095**

Term Honor: Dean's List

Academic Standing Effective 12/14/2018: Good Standing

2019 Spring

Course		Description	Attempted	Earned	Grade	Points
ISP	304	EXCH IN GERMANY	0.000	0.000	NE	0.000
TREQ	240	LITERARY ARTS	3.000	3.000	PS	0.000
TREQ	250	VISUAL & PERFORMING ARTS	3.000	3.000	PS	0.000
TREQ	370	US DIVERSITY	3.000	3.000	PS	0.000
TREQ	501	MAJOR 1 REQUIREMENT 1	3.000	3.000	PS	0.000
TREQ	601	MAJOR 2 REQUIREMENT 1	3.000	3.000	PS	0.000
TREQ	602	MAJOR 2 REQUIREMENT 2	3.000	3.000	PS	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	18.000	18.000	0.000	0.000
Cumulative GPA	3.773	Cum Totals	63.000	82.000	45.000	169.800

Academic Standing Effective 05/07/2019: Good Standing

2019 Fall

Course		Description	Attempted	Earned	Grade	Points
GERM	302	CONTEMPORARY GERMAN SOCIETY	3.000	3.000	A	12.000
POLI	200	PRES CONG & PUB POL	3.000	3.000	A	12.000
POLI	271	MOD POL THOUGHT	3.000	3.000	A-	11.100
POLI	411	CIVIL LIB IN U S	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	12.000	12.000	12.000	47.100
Cumulative GPA	3.805	Cum Totals	75.000	94.000	57.000	216.900

Term Honor: Dean's List

Academic Standing Effective 12/13/2019: Good Standing

2020 Spring

Course		Description	Attempted	Earned	Grade	Points
COMM	113	PUBLIC SPEAKING	3.000	3.000	A	12.000
GERM	268	AUTEUR CINEMA	3.000	3.000	A	12.000
GERM	303	GERMAN LIT AND CULTURE	3.000	3.000	A	12.000
HIST	162	RUSSIA UNDER LAST TSARS	3.000	3.000	A	12.000
SPAN	101	ELEMENTARY SPANISH	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	15.000	15.000	15.000	60.000
Cumulative GPA	3.846	Cum Totals	90.000	109.000	72.000	276.900

In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill implemented an emergency grading accommodation in the Spring 2020 that allowed for grades of pass/fail.
In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill suspended the Dean's list in the Spring 2020 semester.

Academic Standing Effective 05/05/2020: Good Standing

2020 Fall

Course		Description	Attempted	Earned	Grade	Points
GEOG	111	WEATHER AND CLIMATE	3.000	3.000	A	12.000
GERM	216	THE VIKING AGE	3.000	3.000	A	12.000
GERM	280	PHILOSOPHY/YOUTH CULTURE	3.000	3.000	A-	11.100
GERM	396	INDEPENDENT READINGS	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	12.000	12.000	12.000	47.100
Cumulative GPA	3.857	Cum Totals	102.000	121.000	84.000	324.000

In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill implemented an emergency grading accommodation in the Fall 2020 that allowed for grades of pass/fail.
In response to the academic disruption caused by the Coronavirus pandemic, the University of North Carolina at Chapel Hill suspended the Dean's list in the Fall 2020 semester.

Academic Standing Effective 11/24/2020: Good Standing

End of Official Undergraduate Academic Record

Document Description

The face of this document contains information recorded by the University Registrar comprising the referenced student's academic record. Transcript explanations are shown below. For more information and clarification of historical transcripts and current records, please visit: http://registrar.unc.edu/academic-services/transcripts-certifications/transcript-key-information/

Grading System Explanation

Undergraduate Career

A (-)	Highest Level of Attainment
B (+,-)	High Level of Attainment
C (+,-)	Adequate Level of Attainment
D (+)	Minimal Passing Level of Attainment
F	Failed - Unacceptable Performance
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)
PS	Passing grade for course using Pass/Fail grading
SP	Satisfactory Progress (Authorized only for first portion of Honors Program)

Doctor of Dental Surgery Career

A	Highest Level of Attainment
B	High Level of Attainment
C	Adequate Level of Attainment
D	Minimal Passing Level of Attainment
F	Failed - Unacceptable Performance
PS	Passing grade for course using Pass/Fail grading

Doctor of Medicine Career

The School of Medicine produces separate transcripts for students entering prior to Fall 2014 and seeking the MD degree.

Expanded grade information is available at:
http://www.med.unc.edu/ome/registrar/transcripts

Doctor of Pharmacy Career

A	Highest Level of Attainment
B	High Level of Attainment
C	Adequate Level of Attainment
F	Failed - Unacceptable Performance
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)
H	Clear Excellence
IP	In Progress
P	Entirely Satisfactory
PS	Passing grade for course using Pass/Fail grading

Graduate Career

H	High Pass
P	Pass
L	Low Pass
F	Failed

Graduate grades of H, P, and L should not be interpreted as equivalent to undergraduate grades of A, B, and C, do not accrue quality points, and do not generate GPA

Note: Graduate students enrolled in courses numbered below 400 should receive undergraduate grades

CO	Conditional-final grade pending reexamination and/or limited additional academic work
COF	Fail after remediation
COP	Pass after remediation
F	Failed
H	Honors - Clear Excellence
HP	High Pass - Above Average
P	Pass - Entirely Satisfactory

Law Career

A (+,-)	Highest Level of Attainment
B (+,-)	High Level of Attainment
C (+,-)	Adequate Level of Attainment
D (+)	Minimal Passing Level of Attainment
F	Failed - Unacceptable Performance
FA	Failed - Unacceptable Performance (Absent from final exam but could not have passed even if exam had been taken)
PS	Passing grade for course using Pass/Fail grading

Other Grade Symbols Shared Across Careers

AB	Absent from Exam
BE	(By Exam) Credit by examination without enrollment in the course
CC	(Composition Condition) May be assigned in addition to any regular grade and indicates marked deficiency in English composition
F*	Administratively assigned after failure to convert an Incomplete (IN) or absence (AB) to a grade within the allowed time
IN	Work Incomplete
NE	No Grade Expected
NG	(No Grade) No grade assigned Recorded for all "General Registration" (Course number 400) or Judicial Pending cases
NR	No grade reported
PL	(Placement) Credit based on an evaluation which places the student in an advanced course
W	Withdrawn without penalty
XF	Failure due to an honor court violation and can be changed to a grade of F if student completes prescribed steps to remediate the violation
***	(No Report) Class Roll not received

Course Numbering System

The numbers assigned to Courses are normally categorized as follows:

Effective Fall 2006	Courses Primarily For
001 - 199	First Years and Sophomores
200 - 399	Juniors and Seniors
400 - 699	Advanced Undergraduates and Graduate Students
700 - 999	Graduate Students Only

Quality Points and Quality Point Average

Quality Point Average is determined by dividing the sum of quality points by the sum of semester hours. Grades of NE, NG, NR, PS, SP, BE, PL, W, H, P and L do not generate quality points. Grades of IN and AB in the Undergraduate career (ONLY) are treated as an F.

Quality point values, per semester hour, are assigned as shown below:

A+	4.30	B+	3.30	C+	2.30	D+	1.30
A	4.00	B	3.00	C	2.00	D	1.00
A-	3.70	B-	2.70	C-	1.70	F	0.00
						XF	0.00

Length of the Year: The year consists of two regular semesters of approximately seventeen weeks and a summer session which is divided into two terms of approximately five and one half weeks each.
Credit Hours: One semester credit is the value of each lecture hour or two to three laboratory hours per week whether or not the course was passed.
Release of Information: A transcript is a confidential document that cannot be released to a third party without the written consent of the student. This is in accordance with the Family Educational Rights and Privacy Act of 1974.
Academic Standing: A student is in good academic standing unless otherwise noted on the transcript. Disciplinary penalties are shown only when these are in effect at the time the transcript is issued.

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend my former student, Alex Hartman, for a clerkship in your chambers. Alex is a strong student with excellent legal research, analysis, and writing skills. I give him my highest recommendation.

Alex enrolled in my national security law class at GW Law School in the fall of 2023, and he soon stood out as one of the very top students in a class of more than 40 students. The course is especially demanding because it covers many bodies of law (international and domestic, constitutional and statutory) and the legal issues are difficult and complex. Students must parse the intricacies of the Foreign Intelligence Surveillance Act (FISA), comprehend the detailed procedures related to criminal prosecutions in U.S. military commissions, as well as understand fundamental principles of constitutional law regarding separation of powers and the use of force. Furthermore, I demand a lot of the students in class, as I use the Socratic method to call on them every day, although I do also take volunteers. The class was particularly demanding in the fall of 2023 because I offered it online. In this online version, I required students to engage in multiple online activities and exercises, for example to post short, written legal memos or videos of themselves making legal arguments on particular issues.

Alex stood out in the class from the beginning of the semester both when called on and as a volunteer in the synchronous class sessions. He was uniformly well-prepared for class and gave thoughtful, careful responses to the questions I posed. In particular, he was not only good at analyzing the case, statute, or treaty at hand but also at evaluating any hypotheticals I would throw at him. For example, in one exchange, I asked Alex to describe the legal basis for the so-called "wall" between intelligence-gathering officials and law-enforcement officials prior to the September 11, 2001 attacks on the United States. He was easily able to identify the cases that had located the requirement for such a "wall" in the Fourth Amendment to the U.S. Constitution, as well as the impact of the "wall" in limiting surveillance of Zacarias Moussaoui, the "20th hijacker" (a replacement for one of the men who conducted the September 11 attacks). Furthermore, Alex was easily able to identify potential counter-arguments to the interpretation of the Fourth Amendment that had formed the basis for the "wall." I should also note that, as a volunteer, Alex contributed well-reasoned, interesting points to the class discussion in a way that engaged other students' perspectives helpfully and respectfully. The class was the better for his participation.

Alex also excelled in the multiple, asynchronous, online activities I assigned. These were numerous and difficult, and many students failed to complete them – but not Alex! He uploaded terrific videos displaying sharp, incisive, legal argumentation skills. For example, he made very impressive arguments, both pro and con, on the question of whether the U.S. executive branch may conduct surveillance of U.S. citizens without first seeking approval from the FISA court, when there is no statutory provision allowing such surveillance. His written assignments were also clear, well-reasoned, and well-written.

I was therefore not surprised when I discovered that Alex had written a top-notch exam, and indeed was one of the very best exams in the class, earning a rare A grade. It was succinct, lucid, beautifully written, and hit all the major points in the issue-spotter questions I had asked. He also produced a carefully-reasoned argument on the other part of the exam, the so-called "policy" question, in which I asked students to recommend amendments to the Foreign Intelligence Surveillance Act (FISA). More broadly, Alex's record shows that his grade in my class was not an aberration but rather the norm for him. At a law school with a strict (and low) grading curve, Alex's academic record is solid and speaks for itself. He graduated with honors and is in the top cohort of his class at GW Law.

Based on Alex's performance in class, I have asked him to serve as my research assistant, and I am very glad that he has accepted. His background indicates that he has very strong research skills. Notably, his undergraduate thesis, "The Theatrical Role of Honorable Death in the National-Socialist German Death Cult," offers a fascinating take on how the fledgling Nazi regime used entertainment media – in particular books, theater plays, radio plays, and movies – to normalize its hateful ideology and to undermine democracy. The common theme of "honorable death" recurred in these pieces, emphasizing the "glory" in dying for the regime. Alex says that this research kickstarted his interest in national security law.

It bears mentioning that Alex has been deeply engaged in leadership roles within the in the GW community. As the faculty director of the law school's program in National Security, Cybersecurity, and Foreign Relations Law, I can attest that as a member of the national security law association, Alex has made important contributions to events and activities at the law school in this area. He has also had an impressive number of government internships, which he has juggled successfully with a strong academic record, and which bodes well for his professionalism and time-management skills. His election to serve as the Notes Editor of the competitive Federal Circuit Bar Journal indicates that his peers respect him. Alex is also a person who knows how to have fun and has interests beyond the law. For example, he is a self-taught guitarist.

Laura Dickinson - ldickinson@law.gwu.edu

In sum, I think highly of Alex. His analytic and writing abilities are strong. And his collegiality and professionalism make it clear that he would be both conscientious and a pleasure to work with. I recommend that you give his application very careful consideration.

Best regards,

Laura A. Dickinson
Oswald Symister Colclough Research Professor
and Professor of Law

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Alexander Hartman for a clerkship. Alex is a bright and capable rising third year law student who would be an invaluable asset your chambers.

Alex was my student in my first year Fundamentals of Lawyering class at The George Washington University Law School. This is a year-long course and he was one of 16 students in this small class. I have gotten to know Alex well both inside and outside the classroom during his first two years at GW. I feel qualified to appraise his writing skills, analytical ability, professional judgment, and work ethic, among other qualities.

Fundamentals of Lawyering encompasses the traditional legal research and writing curriculum, but filters it through a client service lens. Students represent a “client” in the fall and the spring and focus on “solving a problem” for their client and communicating those solutions. Through this class, Alex demonstrated all of the skills required of a strong law clerk. He is a strong writer and sound analytical thinker. He is a particularly strong predictive writer and his objective memos are clear, concise, and structured well. He’s therefore particularly well-suited to writing bench memos and judicial opinions.

Alex’s strong writing skills earned him a place as a GW Law Writing fellow, essentially a writing tutor for first year students. Alex was selected to be a writing fellow after a competitive application process and bested many other candidates for the coveted position.

Alex’s oral presentation abilities are also strong. He excelled in our trial and appellate level arguments, but equally important in our mock “report to supervisor” research conferences.

As part of the Fundamentals of Lawyering curriculum, students also meet with and interview a mock client. Alex excelled in this particular exercise. He diffused a difficult situation with an unhappy “client” displaying exemplary listening skills and high EQ. His maturity and unflappable grace under pressure sets him apart from other students I have taught. Alex is relatable and unpretentious and “wears well” in repeated interactions with strangers and colleagues alike. He inspires trust in others through his unusual combination of aptitude and humility, qualities that will make him an excellent clerk.

Alex is also a self-directed learner who puts the same effort into ungraded assignments as he does into graded assignments. Unlike some students who approach law school just to get an “A,” Alex always demonstrated deep commitment to the learning process and to bettering his skills.

As a clerk, you can trust Alex to take initiative and step out of his comfort zone though he will always seek advice and counsel when appropriate. This maturity of judgment sets him apart from other students and is a quality that will serve him well in clerkship and in practice.

On a personal note, Alex is a quiet leader in the classroom who is liked and respected by his peers. He was a thoughtful contributor to class discussions and a cooperative team player during group exercises. I was unsurprised to learn that Alex enjoys playing team sports in his spare time because he is the consummate team player in the classroom.

Alex’s skills and personality traits will make Alex a successful clerk and the type of lawyer our profession needs more of. I recommend him without reservation. If I can provide more information about his qualifications, please do not hesitate to contact me.

Sincerely.

Erika N. Pont

Visiting Professor of Law
Interim Associate Director, Fundamentals of Lawyering Program
The George Washington University Law School
202-412-9696
epont@law.gwu.edu

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Alex Hartman for a clerkship with your chambers. Alex is an extremely talented 2L (soon to be rising 3L) at George Washington University Law School, and I had the pleasure of teaching him in my Disinformation, National Security, and Cybersecurity course in the Spring of 2023. Alex always came to class prepared, turned in outstanding written work, and provided insightful comments during class discussions – in short, he is an exceptional student. In a competitive class of 26 students, Alex's final grade in the class was an "A." Each of his required three papers was well written, well organized, contained a clear thesis, and demonstrated excellence in legal analysis and statutory interpretation.

Alex has already developed an impressive resume. His prior experience as a Judicial Intern for Judge Timothy Kelly on the U.S. District Court for the District of Columbia and for Judge Kathryn Davis on the U.S. Court of Federal Claims will prepare him well for a clerkship in your chambers, as will his prior experience interning with National Security Section at the U.S. Attorney's Office for the District of Columbia. He also will add to those stellar credentials and further hone his legal skills with internships this summer and fall at the United States Office of Special Counsel and the Department of Justice's National Security Division, respectively.

Earlier in my career, I served as a law clerk for a judge on the U.S. Court of Appeals for the 10th Circuit, and I believe Alex's sharp intellect, stellar writing skills, natural inquisitiveness, and sincerity would make him an outstanding law clerk. As a former prosecutor and official with the U.S. Department of Justice, I am heartened to see students like Alex demonstrating a desire to dedicate their skills to our country's justice system. I hope you make the decision to interview and hire Alex – you will not be disappointed. Please do not hesitate to contact me at the email address below if I can be of additional assistance.

Sincerely,

Kathleen M. Kedian
Professorial Lecturer in Law
The George Washington University Law School
kkedian@law.gwu.edu

ALEXANDER HARTMAN

825 New Hampshire Ave NW, Apt 208, Washington, DC 20037 | (704) 903-2020 | alexhartman@law.gwu.edu

WRITING SAMPLE

The attached writing sample is a bench memo I wrote for Judge Kelly during my judicial internship at the United States District Court for the District of Columbia. This memo contains my wholly original legal analysis and research and has not been edited by anyone except myself.

For brief context, Judge Kelly asked me to analyze three legal questions presented in a case before him.[1] In that case, pro se Plaintiff sued Defendant in the D.C. Superior Court alleging federal employment discrimination. Defendant removed the case to federal district court and filed a motion to dismiss, alleging various jurisdictional and cause-of-action defects in the complaint. This memo provides relevant case law and advises chambers on disposition of the motion.

[1] Pursuant to Judge Kelly's writing sample policy, this sample omits the specific facts of the case and anonymizes legal analysis of the motion. Certain identifiable language, such as party names and Executive Orders relied upon for relief, have been altered, omitted, or redacted.

To: Judge Kelly
From: Alex Hartman
Date: Fall 2022 Internship
Re: Legal Issues Presented in *Plaintiff v. Defendant*, 22-CV-1234

MEMORANDUM

You asked me to analyze legal questions presented by Defendant in his Motion to Dismiss for lack of subject-matter jurisdiction and failure to state a claim. Specifically, you asked me to answer the following three questions: (1) whether the Court has jurisdiction to enforce Executive Order [redacted]; (2) whether the Court has subject-matter jurisdiction to hear Plaintiff's Title VII claim; and (3) whether Plaintiff is entitled to a *Bivens* cause of action.

This memorandum will provide a factual background [omitted] and the relevant legal standards before analyzing case law for each legal question posed in the order above. In short, the Court neither has jurisdiction to enforce Executive Order [redacted] nor to hear Plaintiff's Title VII claim. Although jurisdiction is proper regarding Plaintiff's *Bivens* claim, the Court should find that Plaintiff is not entitled to relief under that cause of action.

I. Background

[Pursuant to Judge Kelly's writing sample policy, the specific facts of this case are omitted from this writing sample].

II. Legal Standards

A. Rule 12(b)(1) Motion to Dismiss

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a claim must be dismissed if a district court lacks subject-matter jurisdiction to entertain the claim. FED. R. CIV. P. 12(b)(1). When a defendant files a motion to dismiss on multiple grounds, the Court must first examine the Rule 12(b)(1) challenges, because "if it must dismiss the complaint for lack of subject[-]matter jurisdiction, the accompanying defenses and objections become moot and do not need to be

determined." *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp.2d 59 (D.D.C. 2011) (citing *U.S. ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C. Cir. 1999)).

Although their claims are to be "liberally construed," *Estelle v. Gamble*, 429 U.S. 97, 108 (1976), pro se plaintiffs nonetheless bear the burden of establishing that the Court has subject-matter jurisdiction. *Bickford v. Government of U.S.*, 808 F. Supp. 2d 175, 179 (D.D.C. 2011). In deciding whether subject-matter jurisdiction exists, the Court may consider the complaint alone or may consider materials beyond the pleadings. *Id.*

B. Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must dismiss a complaint if the plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain only a "short and plain statement of the claim" showing that the pleader is entitled to relief that gives the defendant fair notice of what the claim is and the grounds upon which it relies. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). In other words, the facts alleged in the complaint must be sufficient "to state a claim to relief that is plausible on its face." *Id.* at 570.

On a Rule 12(b)(6) motion to dismiss, the Court must accept as true all the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Though the complaint is "construed liberally in the plaintiffs' favor, and [the Court should] grant plaintiffs the benefit of all inferences that can be derived from the facts alleged," the Court need not accept inferences drawn by the plaintiff if those inferences are "unsupported by facts alleged in the complaint; nor must the court accept the plaintiff's legal conclusions." *Kowal v. M.C.I. Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). While pro se complaints are held to a less stringent standard "than complaints drafted by attorneys, 'pro se complaints, like any other, must present a

claim upon which relief can be granted by the court.'" *Boyd v. Chertoff*, 540 F. Supp. 2d 210, 124 (D.D.C. 2008) (quoting *Crisafi v. Holland*, 655 F.2d 1205, 1308 (D.C. Cir. 1981)).

III. Analysis

The following subsections will answer the posed legal questions in the following order: (1) whether the Court has jurisdiction to enforce Executive Order [redacted]; (2) whether the Court has subject matter-jurisdiction over the Title VII claim; and (3) whether Plaintiff is entitled to a Bivens cause of action. Each subsection will provide a short answer followed by case law analysis.

1. Does the Court have jurisdiction to enforce Executive Order [redacted]?

Short answer: the Court does not have jurisdiction because only Congress can waive sovereign immunity and it has not done so here.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Sovereign immunity is jurisdictional in nature, *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994), and bars suits for money damages against officials in their official capacity absent a specific waiver by the government. *Clark v. Library of Congress*, 750 F.2d 89, 103 (D.C. Cir. 1984).

A waiver of sovereign immunity cannot be implied but must instead "be unequivocally expressed" by Congress. *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 95 (1990). No executive officer can by his action waive sovereign immunity and confer jurisdiction on the courts. *See United States v. Shaw*, 309 U.S. 495, 501 (1940); *see also Carr v. United States*, 98 U.S. 433, 433 (1878) ("Without such [a congressional] act, no direct proceedings will lie at the suit of an individual against the United States or its property; and its officers cannot waive its [sovereign immunity] privilege in this respect"). This "includes the President and all Executive Agencies."

Pettit v. United States, 203 Ct. Cl. 207, 225 (1973) (Skelton, J., dissenting); *see Dep't of the Army v. F.L.R.A.*, 56 F.3d 273, 275 (D.C. Cir. 1995) (officers of the United States have no power to waive federal sovereign immunity absent express provisions by Congress).

Here, Plaintiff brings an action for money damages relying on Executive Order [redacted]. ECF No. 1-1 at 3. An Executive Order issued by the President cannot waive the federal government's sovereign immunity. *See Shaw*, 309 U.S. at 501. Without such waiver, the Court lacks subject-matter jurisdiction to hear Plaintiff's claim.

Even if the Court had subject-matter jurisdiction here, an executive order is privately enforceable only if it is issued pursuant to a statutory mandate or delegation of congressional authority. *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980). Executive Order [redacted] was issued pursuant to no such mandate or delegation of authority. Instead, Executive Order [redacted] merely provides further amendment to another Executive Order by prohibiting discrimination based on an individual's status as a [omitted]"[2] [Citation omitted]. Further, Executive Order [redacted] explicitly "does not confer any right or benefit enforceable in law or equity against the United States or its representatives." [Citation omitted].

Therefore, because Executive Order [redacted] cannot waive the federal government's sovereign immunity, the Court, and the D.C. Superior Court before removal, is without jurisdiction and should dismiss Plaintiff's Executive Order claim under Rule 12(b)(1).

[2 The specific status protected by the Executive Order is omitted from this sample for anonymity. For clarity, this omitted status was not one of the statutorily protected statuses listed in Title VII (race, color, religion, sex, or national origin)].

2. Does the Court have subject-matter jurisdiction to hear Plaintiff's Title VII claim?

Short answer: the Court is without jurisdiction to hear Plaintiff's Title VII claim under the derivative jurisdiction doctrine.

"The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction." *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922). Applying this principle, federal courts have found that if a State court lacks subject-matter jurisdiction over a suit, "the federal court likewise lacks jurisdiction over the suit upon removal." *Merkulov v. United States Park Police*, 75 F. Supp. 3d 126, 129 (D.D.C. 2014)). Put otherwise, if the state court had no subject-matter jurisdiction over the case, then there is no jurisdiction for the federal court to acquire upon its removal—even if the federal court would have possessed original jurisdiction over the matter had it been filed there in the first place. *See Merkulov*, 75 F. Supp. 3d at 129.

Here, the D.C. Superior Court lacked subject-matter jurisdiction over Plaintiff's Title VII claim because, although Title VII does contain a recognized waiver of sovereign immunity in federal courts, it does not waive the United States' sovereign immunity in state courts. *Robinson v. United States Dep't of Health and Hum. Res.*, No. 21-1664-CKK, 2021 WL 4798100 at *4 (D.D.C. Oct. 14, 2021). Specifically, Title VII waives the sovereign immunity of the United States by "authorizing a federal employee who has exhausted his administrative remedies to file a civil action against 'the head of the department, agency, or unit' by which he is employed." *Day v. Azar*, 308 F. Supp. 3d 140, 142 (D.D.C. 2018) (quoting 42 U.S.C. § 2000e–16(c)). In turn, § 2000e-5 makes clear that this waiver applies only to claims filed in each "United States district court and each United States court of a place subject to the jurisdiction of the United States." 42 U.S.C. § 2000e–5(f).

The D.C. Superior Court, however, is considered a state court for removal purposes, rather than a court of the "United States." 28 U.S.C. § 1451(1); *see Palmore v. United States*, 411 U.S. 389, 408–09 (1973) (describing the District of Columbia court system as similar "to those of the local courts found in the 50 States of the Union"). Because the D.C. Superior Court is not a court of the "United States," the federal government's sovereign immunity applies in Title VII actions heard there, stripping the D.C. Superior Court of subject-matter jurisdiction. Under the derivate jurisdiction doctrine, the District Court is barred from hearing the same claims upon removal. *See Merkulov*, 75 F. Supp. 3d at 129. For this reason, the Court should dismiss Plaintiff's Title VII claim under Rule 12(b)(1).

3. Is Plaintiff entitled to a *Bivens* cause of action?

Short answer: Plaintiff is not entitled to a *Bivens* cause of action because Congress has already provided a comprehensive scheme for federal employment discrimination remedies.

Unlike Plaintiff's other claims, because the D.C. Superior Court had subject-matter jurisdiction over her *Bivens* claim, so does this Court upon removal. *Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990). A *Bivens* claim is an implied cause of action for damages arising from constitutional violations by federal government officials. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971); *X.P. Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 68 (D.D.C. 2015). However, *Bivens* causes of action are not available for "each and every type of constitutional infraction." *X.P. Vehicles, Inc.*, 118 F. Supp. 3d at 68. For example, when Congress has established a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies, courts must withhold their power to fashion damages remedies. *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C.

Cir. 1988) (citing *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) and *Bush v. Lucas*, 462 U.S. 367, 368 (1983)).

Here, Plaintiff asserts an employment discrimination claim due to her alleged termination of federal employment based on her status as a [omitted]. ECF No. 1-1 at 1, 3. However, Title VII is the "*exclusive* judicial remedy for claims of discrimination in federal employment." *Webster v. Spencer*, 318 F. Supp. 3d 313, 320 (D.D.C. 2018) (citing *Brown v. G.S.A.*, 425 U.S. 820, 835 (1976)) (emphasis in original). Because Congress enacted through Title VII a "comprehensive scheme that addresses precisely the wrongdoing alleged" by Plaintiff—federal employment discrimination—her asserted *Bivens* claim must fail. *See id.*; *see also Spagnola*, 859 F.2d at 228. For this reason, the Court should dismiss Plaintiff's *Bivens* cause of action for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

IV. Conclusion

Because Plaintiff is not entitled to *Bivens* relief, and jurisdiction is lacking for Plaintiff's Executive Order and Title VII claims, the Court should grant Defendant's Motion to Dismiss.

Applicant Details

First Name	**Elissa**
Middle Initial	**B**
Last Name	**Harwood**
Citizenship Status	**U. S. Citizen**
Email Address	**e.b.harwood@wustl.edu**
Address	**Address** Street **215 A 80th Street** City **Virginia Beach** State/Territory **Virginia** Zip **23451** Country **United States**
Contact Phone Number	**7574348085**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**June 2009**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 13, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kister, Susan
skister@wustl.edu
Osgood, Russell
rosgood@wustl.edu
Kaufman, Zachary
zachary.kaufman@aya.yale.edu
2038098500

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ELISSA B. HARWOOD
4567 W. Pine Blvd., Unit 611, St. Louis, MO 63108 | 215 A 80th St., Virginia Beach, VA 23451
(757) 434-8085 | e.b.harwood@wustl.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

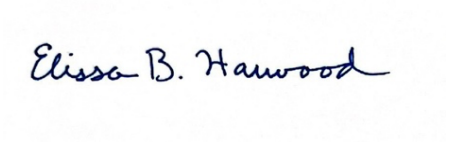
I would like to apply for a clerkship in your chambers beginning in 2024. I am a rising third-year law student at the Washington University School of Law, where I am a Senior Editor of the *Washington University Law Review*. Last year, I served as a teaching assistant for Legal Practice, our 1L writing and research course. I grew up in Virginia Beach, where my family still lives. I hope to return to the Hampton Roads area after law school. A clerkship in your chambers in Norfolk would be ideal exposure to the legal community where I plan to make my home.

Included in my application are my resume, transcript, and writing sample. The writing sample is a self-edited version of my student Note, *Better Good than Lucky: A Legal Analysis of Poker as a Skill Game in a Changing Gambling Climate*. It was selected for publication in the *Law Review* next year. The following individuals are submitting letters of recommendation and welcome inquiries as you consider my application:

Professor Zachary Kaufman Boston University School of Law Zachary.kaufman@aya.yale.edu (203) 809-8500	Professor Susan Kister Washington University School of Law skister@wustl.edu (314) 935-4017	Dean Russell Osgood Washington University School of Law rosgood@wustl.edu (314) 935-4042

I would appreciate any opportunity to interview with you. Please let me know if I can provide additional information. Thank you for your consideration.

Sincerely,



Elissa B. Harwood

ELISSA B. HARWOOD
4567 W. Pine Blvd., Unit 611, St. Louis, MO 63108 | 215 A 80th St., Virginia Beach, VA 23451
(757) 434-8085 | e.b.harwood@wustl.edu

EDUCATION

Washington University School of Law — St. Louis, MO
Juris Doctor Candidate | GPA: 3.87 (Top 10%) — Anticipated May 2024
Honors & Activities: Honor Scholar Award, Dean's List, Scholars in Law academic scholarship recipient
Washington University Law Review, Senior Editor, Note selected for publication
Legal Practice, *Teaching Assistant*, 2022-2023

Cornell University - Samuel Curtis Johnson Graduate School of Management — Ithaca, NY
Master of Business Administration | GPA: 3.78 — May 2013
Honors & Activities: Recipient of James E. and Faith Morrow Graduate Fellowship Scholarship
Johnson Leadership Fellow

Princeton University — Princeton, NJ
Bachelor of Arts in School of Public & International Affairs | GPA: 3.80, *magna cum laude* — June 2009
Honors & Activities: Semester internship with Senate Foreign Relations Committee
Elected to Phi Beta Kappa Society

EXPERIENCE

Miller & Chevalier Chartered — Washington, D.C.
Summer Associate — Summer 2023

- Research white collar defense, compliance, and government contracts issues and write memoranda and articles synthesizing findings to assist attorneys with brief writing, case strategy, and business development
- Created a presentation about sanctions for partners to deliver to multinational client's compliance board

United States Department of Justice, Commercial Litigation Branch — Washington, D.C.
National Courts Section Legal Intern — Summer 2022

- Researched and analyzed legal issues arising from ongoing government litigation
- Wrote motions for summary judgment and summary affirmance for the Federal Circuit
- Assisted with deposition preparation and moot court sessions before oral arguments

Wilks, Alper, Harwood & McIntyre, P.C. — Virginia Beach, VA
Litigation Team Member (part time) — 2019-2021

- Assisted firm partners and outside counsel with reviewing, analyzing, and revising draft complaints, counterclaims, pleas in bar, and other filings
- Edited documents for substance, clarity, and consistency

Ivy League Property Management, LLC — Virginia Beach, VA
Founder — 2015-2021

- Specialized in serving disabled and elderly clients who were transitioning from independent to assisted living facilities or who required assistance with home and personal care management to live independently
- Renovated homes, including cost-benefit analysis, aesthetic decisions, and hiring and managing subcontractors
- Assisted with caregiver management and monitoring, and liaised with trust administrators
- Managed business issues such as client acquisition, company contracts, and billing

Caesars Entertainment Corporation — Las Vegas, NV
MBA Leadership Development Program Fellow (Bally's, Paris, and Planet Hollywood) — 2013-2014

- Provided quantitative analysis of food and beverage sales for three large casinos and built Excel macros to assist operations departments with daily data analytics needs
- Interfaced with operations department heads and corporate executives daily to manage projects and explain method and meaning of data analysis results

SKILLS & INTERESTS

Former professional poker player and gaming blogger, voter protection experience, dedicated hockey fan

Washington University in St. Louis

Office of the University Registrar

Record Of: **Harwood, Elissa B**
Student ID Number: 502207

Current Programs Of Study:
JURIS DOCTOR

Transcript Issued 06/12/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0		CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (KISTER)	LAW	W74 500V	2.0		A+
PROPERTY (D'ONFRO)	LAW	W74 507X	4.0		A
TORTS (NORWOOD)	LAW	W74 515F	4.0		A+
CONSTITUTIONAL LAW I (OSGOOD)	LAW	W74 520C	4.0		A

Enrolled Units 14.0 Semester GPA 3.92 Cumulative Units 14.0 Cumulative GPA 3.92

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0		P
LEGAL PRACTICE II: ADVOCACY (KISTER)	LAW	W74 500W	2.0		A
CONTRACTS (SHILL)	LAW	W74 501K	4.0		A
CRIMINAL LAW (KAUFMAN)	LAW	W74 502V	4.0		A+
NEGOTIATION (TOKARZ/SHIELDS)	LAW	W74 503G	1.0		CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0		A-

Enrolled Units 16.0 Semester GPA 3.95 Cumulative Units 30.0 Cumulative GPA 3.94

Fall Semester 2022

ADVANCED NEGOTIATION THEORY AND PRACTICE (HOLLANDER-BLUMOFF)	LAW	W74 578E	2.0		A
TEACHING ASSISTANT	LAW	W74 600R	1.0		CR
ARBITRATION LAW THEORY AND PRACTICE	LAW	W74 612F	3.0		A+
EMPLOYMENT LAW (CRAIN)	LAW	W74 613C	3.0		A
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0		A
LAW REVIEW	LAW	W77 600S	1.0		CR

Enrolled Units 14.0 Semester GPA 3.89 Cumulative Units 44.0 Cumulative GPA 3.92

Spring Semester 2023

TOPICS IN SPORTS LAW (KOLLER)	LAW	W74 510E	1.0		B+
CRIMINAL PROCEDURE: INVESTIGATION (EPPS)	LAW	W74 542L	3.0		A
FEDERAL INCOME TAXATION (WIEDENBECK)	LAW	W74 549G	4.0		A-
TEACHING ASSISTANT	LAW	W74 600R	1.0		CR
CORPORATE AND WHITE COLLAR CRIME (ALBUS/GOLDSMITH/HARLAN)	LAW	W74 642D	2.0		A
COMPLEX CIVIL LITIGATION (R. JACKSON)	LAW	W74 651B	2.0		A-
LAW REVIEW	LAW	W77 600S	1.0		CR

Enrolled Units 14.0 Semester GPA 3.70 Cumulative Units 58.0 Cumulative GPA 3.87

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis

Office of the University Registrar

Record Of: **Harwood, Elissa B**
Student ID Number: 502207

Spring Semester 2023

Distinctions, Prizes and Awards

FL2021 DEAN'S LIST
SP2022 DEAN'S LIST
SP2022 HONOR SCHOLAR AWARD
FL2022 DEAN'S LIST

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

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Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

Washington University in St. Louis
SCHOOL OF LAW

January 6, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Elissa Harwood

Dear Judge Walker:

Elissa Harwood is a superior candidate for a judicial clerkship. I urge you to consider her for a term position after her 2024 graduation.

Elissa was a student in my Legal Practice class, where she consistently stood out. Not only did she excel at legal analysis and writing, but she demonstrated traits which I deem critical for law clerks—the ability to speak up, challenge assumptions, and ask probing questions. In my many years as a criminal defense attorney, I would have welcomed Elissa's ability to work under pressure, confident that she would produce a consummate proposed order or memorandum of law. Moreover, in my current position as a staff attorney with the Eighth Circuit Court of Appeals—where I work daily with term clerks—I can say without hesitation that Elissa's legal acumen is among the best.

I also note that Elissa has a background in finance, business, and journalism; has interned with the Department of Justice; and is interested in legislation, mediation, and governmental affairs. Her understanding of complex commercial transactions, her keen sense of justice, and her intellectual curiosity would serve her well in analyzing many of the issues that come before the court.

As a testament to Elissa's academic proficiency and work ethic, I invited her to be my teaching assistant for the 2022-2023 school year. She has proven herself worthy of the task, providing guidance, direction, and, importantly, discretion, to my many first-year students.

I can simply think of no law student better prepared to meet the challenges and rigors of a judicial clerkship. Elissa would be an invaluable asset to the court.

Best,

/s/

Susan Kister
Lecturer in Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

January 4, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for Elissa Harwood

Dear Judge Walker:

It is my great pleasure to recommend Elissa Harwood to you as a law clerk. Elissa is in her second year here at Washington University School of Law where I am the Dean and a Professor of Law. Before coming to Washington University, I was the President of Grinnell College (1998-2010) and, prior to that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School in Ithaca, New York.

I first got to know Elissa in the fall of 2021 when I had her as a student in our basic Constitutional Law course (structure and functions). Elissa spoke well in class and wrote a well-crafted and an excellent research paper on Murphy v. NCAA—sports betting and the clash of New Jersey and federal law. She performed outstandingly on a very difficult final exam and received a final grade of A in the course.

Elissa is lively, self-confident, and intelligent. She is a capable researcher with outstanding writing skills. Elissa interacts well with her fellow students and would be discrete and thoughtful in chambers. She is a careful listener and team player.

I would be happy to talk with you or anyone in your chambers about this top prospect for a clerkship position. (Cell #: 641-821-3712).

Best,

/s/

Russell K. Osgood
Dean
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Zachary D. Kaufman, J.D., Ph.D.
William & Patricia Kleh Visiting Professor

Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
203.809.8500 | zachary.kaufman@aya.yale.edu
Website | Social Science Research Network

January 8, 2023

Re: Recommendation for Elissa Harwood

Dear Judge:

I write in glowing support of Elissa Harwood's application to serve as a judicial law clerk in your chambers. I taught Elissa in 1L Criminal Law during the spring semester of the 2021-22 academic year at Washington University School of Law in St. Louis. She is an intelligent, dedicated student. She earned the highest grade in the class—and the highest grade possible (4.30/A+)—in my course with an impressive exam that showcased her effective writing style and analysis of legal doctrine, philosophy, and policy. She demonstrated her ability to connect the dots—to take concepts and rules we learned during the semester and apply them in different contexts to my creative fact patterns. She also showed deeper understanding of the themes of the course in her answers to policy-related questions.

Not only does Elissa exhibit strong academic skills, she is also collaborative in her approach and supportive of others. While preparing to teach an accelerated Criminal Law class the following summer, I asked Elissa for a copy of her course outline, which she willingly shared. I was impressed with the insightfulness and ability to succinctly synthesize the various legal theories covered in the course. Elissa's outline was thorough, well-organized, and effectively integrated Restatement rules, case law, legal philosophy, and class discussions. Seeing her outline, I can understand how much care and diligence went into her daily class and final exam preparation.

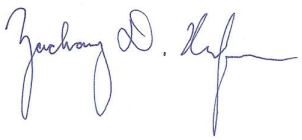
In class, Elissa was always well prepared and willing to engage in our lively class debates. When she volunteered to speak, she always offered valued points that enhanced class discussion. This entire class often had passionately divergent points of view, especially on matters of social justice, yet was collegial in their discourse. A frequent participant, Elissa's mature demeanor allowed her to listen to others and engage respectfully and thoughtfully.

On a personal note, Elissa is personable and engaging. She has an unusual breadth of experience for a law student, and her worldliness and maturity stood out. In addition to academically rigorous high school, college, and graduate business school training, she has years of experience outside of academia. Her real-world work experience allowed her to connect with people in many walks of life, broadening her perspective and informing her understanding of social and legal issues.

Elissa's emotional intelligence and strong work ethic, steered by her facile mind and supported by her strong academic background and varied life experiences, will make her a valuable

law clerk and eventually, a bright and enormously successful lawyer. I recommend her without reservation. If you should have any questions, please contact me. Thank you for your consideration of this outstanding candidate.

Sincerely yours,



ELISSA B. HARWOOD
4567 W. Pine Blvd., Unit 611, St. Louis, MO 63108 | 215 A 80th St., Virginia Beach, VA 23451
(757) 434-8085 | e.b.harwood@wustl.edu

WRITING SAMPLE

The attached writing sample is my student Note for the *Washington University Law Review*. *Better Good than Lucky: A Legal Analysis of Poker as a Skill Game in a Changing Gambling Climate* has been selected for publication in Volume 101 of the *Law Review* in 2024. I argue that when courts objectively apply the dominant factor test to determine whether an activity is a permissible skill game or an illegal game of chance under state and federal law, they should find that poker is a game of skill. Given the liberalization of gambling policy across the country, it no longer makes sense for courts to distort the test through a lens of paternalism. Pages 9–19 contain my explanation and analysis of legal precedent. For discussion of social context, the significance of the proliferation of sports betting and daily fantasy sports, and a potential legislative solution, read pages 26–35.

During the publication process in the coming year, this Note will undergo significant editing. This version has only been edited by me. I did consult with a *Law Review* Notes Editor while selecting and refining my topic.

Harwood Writing Sample

Better Good than Lucky:
A Legal Analysis of Poker as a Skill Game in a Changing Gambling Climate

Economist Steven Levitt likens the game of poker to playing a sport or a musical instrument.[1] Many people from all walks of life enjoy playing recreationally. It takes little skill to pick up a basketball or a violin, but a great deal of skill obtained over thousands of hours of practice to play well. People spend money to improve, take lessons and hire coaches. Millions play for enjoyment; a much smaller group plays on college teams or in dive bars. And a rarefied few make it to Madison Square Garden. No one disputes that those activities require skill or that there is some luck involved in making it to the top. Poker is much the same, yet the law generally treats it as a game of pure luck, a vice from which the American public needs to be protected.

Poker is restricted by both federal and state law.[2] The Unlawful Internet Gambling Enforcement Act (UIGEA), passed in 2006, outlaws the knowing receipt of funds over the internet for the purposes of gambling.[3] Although it does not expressly ban online poker, it effectively cut off the United States from the global online poker industry and ended Americans' ability to play online professionally or recreationally. The UIGEA does not define illegal gambling but instead relies on state definitions. Other applicable federal statutes also defer to states to determine what constitutes illegal gambling.[4]

State gambling laws rarely mention poker, online or otherwise. Instead, they rely on the courts to determine what counts as gambling. Most states use the "dominant factor test" to judge whether luck or skill is the primary influencer of the outcome of a game to decide if it falls under gambling regulations.[5] Roulette is strictly luck-based. Chess is on the other end of the spectrum, although even chess "can be affected by the random factors of who draws white (and thus goes

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[1] Steven D. Levitt, Thomas J. Miles & Andrew M. Rosenfield, *Is Texas Hold'em a Game of Chance? A Legal and Economic Analysis*, 101 GEO. L.J. 581, 582 (2013).

[2] For the purposes of this Note, poker refers to any variant of the card game where players compete against each other but does not include table games or video lotteries labeled poker where participants face losing odds against the house.

[3] Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367.

[4] Illegal Gambling Business Act, 18 U.S.C. § 1955(a); Wire Act, 18 U.S.C. § 1084.

[5] Op. of the Justices, 795 So. 2d 630, 635 (Ala. 2001).

first) or whether one's opponent is sick or distracted."[6] Most games, and indeed life activities, fall somewhere in between. Poker, this Note argues, is on the skill side of the spectrum. As attitudes toward gambling liberalize across the country, it is time for courts to treat poker as the evidence demands—as a game of skill.

Part I of this Note provides an overview of federal gambling laws as they relate to poker. Part II addresses state gambling law, beginning by discussing a variety of tests that courts use to determine which activities are covered by prohibitions on games of chance, and then explains how the most common test is applied incorrectly. Part III delves into statistical and qualitative evidence that poker is a skill game and discusses one case where the dominant factor test was properly applied. Part IV considers the moralizing and paternalistic motives for courts' traditional distortions of the test and finds that, given the proliferation of sports betting and daily fantasy sports, it does not make sense to treat poker as uniquely problematic. Part V suggests that the best way forward is through state-by-state legislation to legalize and regulate poker. In some states, a court's correct application of the dominant factor test to designate poker outside of an existing gambling ban could nudge legislators in the right direction.

I. Applicable Federal Gambling Laws

To understand the relevance of the skill versus chance debate, it is necessary to look at the interplay between state and federal gambling regulation. Three federal laws have the most bearing on the legality of poker across the country. The UIGEA, which addresses online wagering, does not explicitly mention poker, but was enacted specifically to curb the proliferation of online poker.[7] The Illegal Gambling Business Act (IGBA) is the primary federal statute concerning brick-and-mortar poker operations.[8] Both defer to states on the definition of illegal gambling. Interpretation

[6] Dew-Becker v. Wu, 178 N.E.3d 1034, 1039 (Ill. 2020).

[7] Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367.

[8] Illegal Gambling Business Act, 18 U.S.C. § 1955.

of the Wire Act[9], and its relevance to forms of gaming other than sports betting, is currently in flux and of great importance to the future of online poker.[10]

A. Unlawful Internet Gambling Enforcement Act

The UIGEA, passed in 2006, aims to curb internet gambling by prohibiting financial institutions from knowingly accepting or processing illegal payments "in connection with the participation of another person in unlawful internet gambling."[11] The UIGEA specifies that an unlawful internet gambling transaction refers to "any wager that is unlawful in the particular jurisdiction where the bettor is located."[12] The statute defines the term "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome."[13]

Unlike other anti-gambling statutes, where poker has been collateral damage in a crackdown on mob-run numbers rackets, the UIGEA was prompted by early-2000s animus against

[9] Wire Act, 18 U.S.C. § 1084.

[10] Parita Patel, *Re-Interpreting and Amending the Wire Act and the Unlawful Internet Gambling Enforcement Act to Address Modern Forms of Online Gambling*, 50 RUTGERS L. REC. 74; Christopher Soriano, *The Consequences of Federal Attempts to Regulate State Gaming Policy – PASPA and the Wire Act as Two Sides of the Same Coin*, 45 SETON HALL LEGIS. J. 635; Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling*, UNLV CENTER FOR GAMING RESEARCH (Sept. 2014).

[11] 31 U.S.C. §§ 5361-5367. The Congressional Findings and Purpose section of the UIGEA states that the 1999 National Gambling Impact Study Commission "recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites." 31 U.S.C. § 5361(a)(2).

[12] John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020 Wis. L. Rev. 907, 953 (2020). The statute allows for intermediate routing, meaning transactions sent across state lines via the internet are permitted if they are not prohibited in the starting or ending jurisdiction, even if they are illegal in a state through which the data is transmitted. The UIGEA was designed to target offshore operators, so the emphasis was placed on the location of the wager's initiation. *Id.*

[13] 31 U.S.C. § 5362.

internet poker.[14] A small group of Republican lawmakers was concerned about the accessibility of online poker and its growing popularity.[15] There is little evidence, however, that Congress shared the concerns of a few outspoken members. Previous anti-gambling bills did not generate much support, but they did provide language for Senate Majority Leader Bill Frist to borrow for an eleventh-hour attachment to an unrelated bill on port security that had to be passed before Congress recessed for an extended break that night.[16] No Democrats on the Senate-House conference committee even saw the final language of the bill, suddenly containing the UIGEA, until it reached the floor.[17] At that point, conference reports can no longer be amended. Thus, the only option for Congress to stop the UGIEA required a no vote to a homeland security bill five years after September 11th—a political nonstarter. The SAFE Port Act, and with it the UIGEA, passed the House 409–2 and received unanimous support in the Senate.[18]

Despite the motivation behind the UIGEA, the statute does not explicitly mention poker, nor does it criminalize any gambling activity that is not otherwise banned by federal or state law.[19] The statute's circular language essentially defines "unlawful Internet gambling" as gambling that is already unlawful.[20] Because it was passed at the last minute with no discussion, the law had no

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[14] Jeffrey S. Moad, *The Pot's Right: It's Time for Congress to Go "All In" for Online Poker*, 102 KY. L.J. 757, 766 (2014).

[15] Walter T. Champion, *Dueling D.O.J. Opinions Fight for the Soul of E-Gambling in the Wake of* New Hampshire Lottery Commission v. Rosen, 12 UNLV GAMING L.J. 97, 101 (2021).

[16] James Romoser, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, n. 129 (2013).

[17] *Id.*

[18] *See* Ryan S. Landes, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. REV. 913, 932 n.123 (2007); I. Nelson Rose, *Congress Makes Sausages*, 11 GAMING L. REV. 1, 1–3 (2007).

[19] 31 U.S.C. §§ 5361-5367. The UIGEA itself says that it is "necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." 31 U.S.C. § 5361(a)(4).

[20] Romoser, *supra* note 16, at 535.

accompanying regulations or implementation plan.[21] Internet gambling site operators, payment processors, and customers did not know what was actually permitted or prohibited. Some operators left the United States market in response,[22] others continued operations by finding less-reputable payment processors and changing the labeling of their transactions.[23] The UIGEA exacerbated many of the security issues that animated the fear of online poker in the first place. The rampant operation of online poker sites in the United States continued despite the UIGEA until April 15, 2011, a day known as "Black Friday," when the U.S. Department of Justice (DOJ) indicted several of the largest sites and their owners for violations of the UIGEA,[24] the IGBA, bank fraud and money laundering.[25]

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[21] Champion, *supra* note 15, at 101 ("[T]he Board of Governors of the Federal Reserve System and the Secretary of the Department of the Treasury, in consultation with the Department of Justice, 'found it impossible to issue those regulations since it is difficult to determine whether a particular [i]nternet gambling transaction is illegal'").

[22] PartyPoker, the largest international poker website at the time and a publicly traded company on the London Stock Exchange, was among those to withdraw from the U.S. market. Simon Bowers, *Players Walk Away as US Law Wipes Out 90% of PartyGaming's Poker Revenue*, GUARDIAN (Oct. 16, 2006, 7:19 PM), http://www.guardian.co.uk/business/2006/oct/17/usnews.gambling.

[23] Full Tilt Poker, Absolute Poker, and PokerStars were among the most prominent companies to continue operations until they were indicted in 2011. Nate Silver, *After 'Black Friday,' American Poker Faces Cloudy Future*, FIVETHIRTYEIGHT (Apr. 20, 2011, 8:47 PM), http://fivethirtyeight.blogs.nytimes.com/2011/04/20/after-black-friday-american-poker-faces-cloudy-future/.

[24] Since the UIGEA does not criminalize any activity on its own, these violations were predicated on violations of New York state law.

[25] *See Black Friday History Week: How the UIGEA Changed Everything*, POKERLISTINGS (Apr. 10, 2012), http://www.pokerlistings.com/black-friday-history-week-how-the-uigea-changed-everything; *Black Friday: The Day that Changed Online Poker*, CARDPLAYER (Apr. 13, 2012), http://www.cardplayer.com/poker-news/13127-black-friday-the-day-that-changed-online-poker; Gary Wise, *PokerStars Settles, Acquires FTP*, ESPN (July 31, 2012, 5:25 PM), http://espn.go.com/poker/story/_/id/8218085/pokerstars-reaches-settlement-department-justice-acquires-fulltilt-poker; Press Release, U.S. Attorney for the S.D.N.Y., *Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds* (Apr. 15, 2011), *available at* https://archives.fbi.gov/archives/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds.

Black Friday essentially ended the online poker boom era in the United States. But that does not mean there is no hope for a resurgence. Because the UIGEA defines illegal gambling in terms of what is prohibited in the jurisdictions where the bets originate and the payment processing terminates, states remain free to set gambling policy. States can define whether poker is permissible in their state, and networks of states where it is permitted can join together to allow wagering across state lines, provided that poker is legal in all states involved.

B. Illegal Gambling Business Act

The IGBA, passed in 1970, was part of Robert F. Kennedy's fight against organized crime.[26] The statute makes it a federal crime to run a "gambling business" of a certain size.[27] Unlike the Wire Act, which created a new class of activity criminalized under federal law, the IGBA is a bootstrapping statute. A business is only illegal under the IGBA if it constitutes illegal gambling under state or local law. Gambling, as defined by the IGBA, "includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games,[28] or selling chances therein."[29] The non-exhaustive list only explicitly mentions games that "have one thing in common: players bet on fortuitous outcomes of future events over which they have no control," in other words, a game of chance.[30] Despite the implicit emphasis on games of chance, the DOJ has used the IGBA at least twice in major cases prosecuting online poker.[31]

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[26] Romoser, *supra* note 16, at 531.

[27] 18 U.S.C. § 1955(a). To be illegal under the IGBA, a business must have five or more participants and either operate for a minimum of thirty days or exceed $2,000 in gross revenue in a single day.

[28] Games called "policy," "numbers," or "bolita" are "lottery-style games historically associated with organized crime." Romoser, *supra* note 16, at 531, n. 114.

[29] 18 U.S.C. § 1955(b)(1).

[30] Romoser, *supra* note 16, at 532.

[31] The Southern District of New York seized $34 million in online poker players' winnings in 2009, citing both the IGBA and the Wire Act. Instead of going after the profits of FullTiltPoker.com and PokerStars.com, the DOJ seized money won by players, who found themselves unable to cash out. Russell Goldman, *Feds Freeze Poker Champ's Winnings*, ABC NEWS (June 11, 2009), https://abcnews.go.com/Business/story?id=7808131&page=1. The

C. Wire Act

The Wire Act was promulgated in 1961 to target a major funding source of organized crime.[32] Focused on disrupting the flow of information that facilitated horse racing and sports betting over the telephone, the Act criminalizes the passing of gambling information across state lines using electronic wires.[33] The Wire Act was passed long before internet gambling was possible, but during the proliferation of online gambling until 2011, the federal government's position was that the Act prohibited all gambling conducted online.[34] The Wire Act reads:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission of interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers *on any sporting event or contest*, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[35]

The key question is whether the phrase "on any sporting event or contest" applies to every clause in the paragraph or only to "the transmission of information assisting in the placing of bets or wagers" but not to the placing of the wagers themselves.[36] Before 2011, the DOJ interpreted the

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second indictment to cite the IGBA was Black Friday in 2011. *See* Press Release, U.S. Attorney for the S.D.N.Y., *supra* note 25.

[32] Patel, *supra* note 10, at 75.

[33] Wire Act, 18 U.S.C. § 1084.

[34] Champion, *supra* note 15, at 98. For its first 40 years, the Wire Act only applied to sports betting, but a DOJ opinion under the Bush administration in 2001 announced that the act was applicable to all online gambling. Minton, *supra* note 10.

[35] 18 U.S.C. § 1084 (emphasis added).

[36] For a detailed textual analysis of this question, see George E. Kernochan III, New Hampshire Lottery Commission v Jeffrey Rosen: *High Wire Act—Interstate Daily Fantasy Sports Hang in the Balance*, 29 SPORTS LAW J. 91 (2022).

Wire Act as covering all forms of internet gambling, including poker.[37] In December 2011, under the Obama Administration, the DOJ's Office of Legal Counsel quietly reversed its position that the Wire Act covers all kinds of gambling.[38] Instead, they interpreted the sports betting modifier to apply to all of the clauses and decided that the Act only prohibits transmissions related to sports betting and racing.[39] The memo explained that it was "difficult to discern" why Congress would block the transmission of all types of bets but only prohibit the transmission of information related to sports.[40]

The most widespread and immediate effect of the DOJ's 2011 opinion was to allow states to operate lotteries over the internet.[41] It took until 2014 for several states to rely on the opinion to form interstate compacts to allow residents of different states to play poker against each other online. The Multi-State Internet Gaming Agreement (MSIGA), formed in February 2014 between Nevada and Delaware, was the first agreement of its kind creating an association to oversee internet gaming operations in member states.[42] New Jersey and Michigan have since joined.[43]

Despite many states investing in online gambling systems that either required out-of-state transaction processors or relied on participants placing bets across state lines, the DOJ changed its mind again under the Trump Administration. In January of 2019, the DOJ issued a memo dated November 2, 2018 that reversed the 2011 opinion and re-expanded the government's interpretation of the Wire Act to cover all forms of gambling.[44] Gaming law expert Walter Champion described

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[37] Champion, *supra* note 15, at 98. Despite holding that the Wire Act prohibited online poker, the DOJ used the UIGEA to indict online poker providers and did not mention the Wire Act in its April 2011 "Black Friday" indictments.

[38] *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134 (2011).

[39] *Id.*

[40] *Id.*

[41] Champion, *supra* note 15, at 104.

[42] NEV. REV. STAT. § 463.750 (2013).

[43] Lawful Internet Gaming Act, MICH. COMP. LAWS ANN. § 432 (West 2023).

[44] *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1 (Nov. 2, 2018).

the 2018 opinion as "a nonsensical bone thrown to [Sheldon] Adelson," Trump's "friend, casino magnate, intransient foe of internet gambling, and uber campaign contributor…."[45]

In response to the DOJ's 2018 change of heart, the New Hampshire Lottery Commission (NHLC) brought a lawsuit seeking a declaratory judgment that the Wire Act only applies to sports betting. The District Court of New Hampshire held for the NHLC, ruling that the DOJ violated the Administrative Procedure Act in issuing the new memo, and finding that fatal errors in the memo allow the court to set it aside.[46] A week after Sheldon Adelson's death in January 2021, the First Circuit affirmed the decision. The court said the text of the relevant section was "not entirely clear…and…the government's resolution of the Wire Act's ambiguity would lead to odd and seemingly inexplicable results."[47] With the setting aside of the 2018 memo, the 2011 memo returned to force, meaning that unless the DOJ takes further action, the Wire Act will not apply to online poker. The DOJ under President Biden is unlikely to take pains to return to a Trump-era policy struck down by the court. While it is possible that future Republican administrations could revisit the issue, Adelson is no longer alive to lobby against online gaming, and states' reliance on interstate transmission of gambling information only continues to grow.

II. State Gambling Law

Federal anti-gambling legislation rests on state definitions of gambling. A few states, by constitution or penal statute, either explicitly prohibit poker or define illegal gambling in a way that clearly encompasses poker.[48] Only legislative action or state constitutional amendments can

[45] Champion, *supra* note 15, at 99. The opinion attempted to circumvent the lack of congressional will to pass the Restoration of America's Wire Act, a bill heavily advocated for by Adelson and designed to expand the Wire Act to prevent all forms of online gambling. Restoration of America's Wire Act, H.R. 707, 114th Cong. (2015); Alex Rogers, *House Introduces Online Gambling Bill Backed by Sheldon Adelson*, TIME (Feb. 4, 2015, 4:45 PM), https://time.com/3695948/sheldon-adelson-online-gambling/.

[46] N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132 (D.N.H. 2019), aff'd in part & vac'd in part *sub nom* N.H. Lottery Comm'n v. Rosen, 986 F.3d 38, 2021 WL 19177, (1st Cir. Jan. 20, 2021).

[47] *Rosen*, 986 F.3d at 60–61. The First Circuit granted NHLC's motion for summary judgment but found that relief under the Declaratory Judgment Act was sufficient. Accordingly, it vacated the lower court's granting of additional relief under the Administrative Procedure Act.

[48] For example, Wisconsin's state constitution specifically prohibits the legislature from authorizing poker as a state-run lottery. WI. CONST. art. IV, § 24(6)(c) (West, Westlaw through July 2018 amendments). Idaho's state constitution bans gambling as "contrary to public policy," and excludes poker and other casino games from permitted exceptions. ID. CONST. art. III, § 20(1)-

impact the legal status of poker in those locations. This Note focuses on the vast majority of states that leave it to state courts to determine whether poker falls within the contours of illegal gambling within their borders.

Across the country, there are generally three elements required to establish gambling activity: (1) an award of a prize; (2) that is determined by chance; (3) for which consideration was paid.[49] The reward and consideration aspects are rarely in contention, but the meaning of the element of chance is open to judicial interpretation. According to one definition, chance is "a lack of control over events or the absence of 'controllable causation'—'the opposite of intention.'"[50] But "the element of chance in any situation is generally not a question of kind but of degree."[51] How much skill has to be involved before the outcome is no longer determined by chance?

States vary widely in the language used in their statutes and constitutions in reference to the permissible level of chance in an activity before it becomes gambling, suggesting that state courts should apply very different tests to determine which activities are covered by various gambling prohibitions. While a variety of tests exist, in practice, most states use the "dominant factor" test regardless of whether it aligns best with the plain language of the laws of their state.[52] Methodology across courts is inconsistent at best, but courts typically apply their chosen test in artificially restrictive ways in order to designate skill-based games as legally impermissible simply because they are traditionally considered gambling.[53] In particular, courts distort the dominant factor test when analyzing poker in two ways: by applying it qualitatively rather than according to its implied quantitative nature, and by using a single hand as the unit of analysis.[54]

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(2) (West, Westlaw through 2022 2d reg. sess.). Oklahoma penal code explicitly includes poker in its list of games whose operation is forbidden. OKLA. STAT. ANN. tit. 21, § 941 (West 2023).

[49] Emanuel V. Towfigh, Andreas Glöckner, Rene Reid, *Dangerous Games: The Psychological Case for Regulating Gambling*, 8 CHARLESTON L. REV. 147, 160. *See, e.g.*, Commonwealth v. Dent, 992 A.2d 190, 192 (Pa. Super. Ct. 2010).

[50] Op. of the Justices, 795 So. 2d 630, 635 (Ala. 2001) (citing Black's Law Dictionary 231 (6th ed. 1990)).

[51] *Id.*

[52] Levitt, Miles & Rosenfield, *supra* note 1, at 587.

[53] Courts may be motivated by a concern for gambling addicts and, in some cases, the absence of readymade regulatory schemes to police an activity should they find it to fall outside of existing prohibitions on gambling. *Id.*

[54] *See generally* Levitt, Miles & Rosenfield, *supra* note 1.

A. Tests for the Permissible Level of Chance

The earliest cases distinguishing games of chance from games of skill were debates over the meaning of constitutional prohibitions on "lotteries."[55] The "English" and "American" interpretations arose as competing paradigms. Under the English Rule, only games of pure chance constitute lotteries. The influence of any skill, "no matter how *de minimis*," removes a game from falling under a ban on lotteries.[56] The prevailing view in the United States, however, is that games of chance fall on a spectrum, with pure chance lotteries at one end and pure skill games at the other. Games falling at various points along the spectrum can qualify as prohibited lotteries "even though the result may be affected to some degree by skill or knowledge."[57] Courts have developed four different tests to determine how much chance is too much to permit a game to escape anti-gambling regulation.

1. Dominant Factor Test

The dominant factor test, also known as the "American Rule" because of its prevalence, is by far the most common standard in United States courts.[58] Under this test, "it is not necessary for the distribution of prizes to be purely by chance, but only for such distribution to be by chance as the dominating element, even though affected to some extent by the exercise of skill or judgment."[59] Games which are "mathematically more likely to be determined by skill than chance

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[55] *Id.* at 588.

[56] Op. of the Justices, 795 So. 2d 630, 635 (Ala. 2001).

[57] *Id.*

[58] *Id.* The test has also been referred to as the predominant purpose test and the predominant factor test. Dew-Becker v. Wu, 178 N.E.3d 1034, 1040 (Ill. 2020).

[59] State v. Coats, 74 P,2d 1102, 1108 (Or. 1938) (Kelly, J., specially concurring). *See also, e.g.*, Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626, 629 (N.C. App. 2007) ("We have held that an inquiry regarding whether a game is a game of chance or skill turns on whether chance or skill predominates."); Opinion of the Justices, 795 So. 2d at 641 ("…where the *dominant* factor in a participant's failure or success in any particular game or scheme is chance, the scheme is a lottery—despite the use of some degree of judgment or skill.") Hotel Employees & Rest. Employees Int'l Union v. Davis, 981 P.2d 990, 996 (Cal. 4th 1999) ("'Chance' means that winning and losing depend on luck and fortune rather than or at least more than, judgment and skill."); In re Allen, 377 P.2d 280, 281 (Cal. 1962) ("The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game."); State v. Stroupe, 76 S.E.2d 313, 316 (N.C. 1953) ("most courts have reasoned that

are not considered gambling."[60] When applied correctly, the dominant factor test should find games that are 51% skill to be legal.[61] Courts have applied the dominant factor test to a wide variety of activities, from games commonly considered gambling today such as slot machines[62] and roulette,[63] to those less traditionally associated with gambling, including baseball,[64] pinball,[65] and shuffleboard.[66]

The Alaska Supreme Court described the relevant factors to determining when skill is a predominant factor:

> (1) Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment.
> (2) Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill.
> (3) Skill or the competitors' efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme.
> (4) The standard of skill must be known to the participants, and this standard must govern the result.[67]

there are few games, if any, which consist purely of chance or skill, and that therefore a game of chance is one in which the element of chance predominates over the element of skill").

[60] *Dew-Becker*, 178 N.E.3d at 1039.

[61] U.S. v. Dicristina, 886 F. Supp. 2d 164, 231 (E.D.N.Y. 2012) (To predominate, skill must account for a greater percentage of the outcome than chance—i.e., more than fifty percent").

[62] *E.g.*, Hoke v. Lawson, 1 A.2d 77 (Md. 1938).

[63] *E.g.*, Zaft v. Minton, 126 A. 29 (N.J. Ch. 1924).

[64] *E.g.*, Utah State Fair Ass'n v. Green, 249 P. 1016 (Utah 1926). *See also* Ex parte Neet, 57 S.W. 1025 (Mo. 1900).

[65] *E.g.*, Howle v. City of Birmingham, 159 So. 206 (Ala. 1935).

[66] *E.g.*, State v. Bishop, 30 N.C. 266 (1848).

[67] Morrow v. State, 511 P.2d 127, 129 (Alaska 1973).

2. Material Element Test

A handful of states[68] apply a more restrictive test, the material element test, which asks whether chance "has more than an incidental effect on the game in question."[69] It is a more restrictive test, since it considers a contest to be "a game of chance if the outcome depends in a material degree upon an element of chance, even if skill is otherwise dominant."[70] Many games that would not be considered gambling under the dominant factor test would meet the requirements to be gambling under the material element test.[71] Even games widely considered pure skill games, such as Scrabble, could be determined to have a material element of chance involved, since elements like drawing letter tiles could have an impact on the outcome of any particular game.[72]

This test is more subjective than the dominant factor test, since it lacks the requirement that chance accounts for at least 50% of the outcome of any given activity. It has been widely criticized

[68] The exact number of states applying each test is difficult to pin down because many states have conflicts within their courts about the test to use or employ inconsistent language. One study named eight, possibly nine states, as material element states (Alabama, Alaska, Hawaii, Missouri, New Jersey, New York, Oklahoma, Oregon, and possibly Washington) (Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance,* 57 DRAKE L. REV. 383, 393 (2009)), but at least Alabama, Alaska, and New York also rely heavily on the dominant factor test. New York has often been considered a "material element" state. *See* U.S. v. Dicristina, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd on other grounds*, U.S. v. DiCristina, 726 F.3d 92 (2d Cir. 2013); In re Plato's Cave Corp. v. State Liquor Auth., 496 N.Y.S.2d 436 (App. Div. 1985). But a long line of New York cases, beginning with People ex rel. Ellison v. Lavin, 71 N.E. 753 (N.Y. 1904), have applied the dominant factor test. A 2022 decision resolved the conflict, at least for the moment, in favor of the dominant factor test. White v. Cuomo, 192 N.E.3d 300 (N.Y. 2022).

[69] Cabot, Light & Rutledge, *supra* note 68, at 393.

[70] Dew-Becker v. Wu, 178 N.E.3d 1034, 1040 (Ill. 2020) (explaining the differences between the dominant factor, material element, and any chance tests). *See, e.g.*, Thole v. Westfall, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984) ("chance must be a material element in determining the outcome of a gambling game. It need not be the *dominant* element.")

[71] *See, e.g.*, Boardwalk Regency Corp. v. Attorney General of State of N.J., 457 A.2d 847, 850 (N.J. Super. 1982) (rejecting the dominant factor test in favor of the material element test and holding that backgammon is a form of gambling because, "the element of chance, represented by the rolling of two dice to begin the game and at the beginning of each player's turn, is a decidedly material element in the game of backgammon."

[72] *See* Cabot, Light & Rutledge, *supra* note 68.

as depending "too greatly on a subjective determination of what constitutes 'materiality,'" that can vary from court to court.[73]

3. Any Chance Test

In several states, courts have found that the wording of state law requires them to apply an any chance test, determining that the presence of even the smallest element of chance in an activity raises it to the threshold of illegal gambling.[74] This test, as the Supreme Court of Illinois explained, "is essentially no test at all, as every contest involves some degree of chance."[75] Even chess, the gold standard of skill games, would be considered impermissible gambling if the determination of which player moves first is made at random.[76]

4. Gambling Instincts Test

A few courts have completely set aside the skill-chance debate in favor of a gambling instincts test, a highly subjective and paternalistic analysis of the nature of an activity to determine if it appeals to the risk-seeking nature of its participants.[77]

5. A New Originalist Test?

While courts today nearly universally apply some test that weighs the relative influence of skill and chance on the outcome of an activity, judges have proposed another approach. Notably, three of the seven New York Court of Appeals judges who ruled on a 2022 case about the legality of daily fantasy sports supported in the dissent the complete removal of any discussion about luck and skill.[78] Instead, the dissenters advocated abandoning the tests in favor of determining what

[73] *Dew-Becker*, 178 N.E.3d at 1040.

[74] *E.g.*, State v. Gambling Device, 859 S.W.2d 519, 523 (Tex. App. 1993) (reading the relevant Texas statute "to apply to contrivances that incorporate any element of chance, even if the exercise of skill also influences the outcome").

[75] *Dew-Becker*, 178 N.E.3d at 1040.

[76] *Id.* at 1039.

[77] *See, e.g.*, City of Milwaukee v. Burns, 274 N.W. 273, 275 (Wis. 1937) (determining that pinball machines were illegal gambling devices because their commercial appeal came from an "appeal to the gambling instinct").

[78] White v. Cuomo, 192 N.E.3d 300 (N.Y. 2022) (Wilson, J., dissenting).

was considered gambling when New York amended its constitution to prohibit gambling in 1894.[79] The dissent suggests "a careful examination of the historical and social context in which the 1894 amendment was placed in our Constitution, including looking to societal judgments about what types of activities constitute gambling…."[80] The dissenting judges wrote that poker and fantasy sports should both obviously be considered gambling because society previously judged them to be harmful activities.[81] This backwards-looking approach focused on outdated anti-gambling animus rather than factual findings would be a startling departure from the language used in dozens of judicial opinions that frame their analysis under a test like the dominant factor test. But in practice, it may not be far from the way courts apply the test to reach preconceived determinations about what should be considered illegal gambling.

B. Application of the Dominant Factor Test to Poker

The dominant factor test is a nebulous standard that has led to a range of different conclusions about the same activities.[82] Yet it is the best option currently available to courts when evaluating whether poker is legal under gambling statutes that do not explicitly define gambling or offer alternative requirements for a permissible amount of chance. Many of the test's shortcomings stem from the way it is misapplied in order to avoid labeling poker a skill game, even where courts recognize the significant impact skill plays in determining winners and losers. The test is distorted when it is applied qualitatively rather than quantitatively and when courts confine analysis to a single hand of poker.

1. Courts Use Qualitative, Not Quantitative Analysis

The name "dominant factor test" implies a quantitative application, a weighing of two factors – skill and chance – to determine which has the larger impact on the outcome of an activity. But courts have widely rejected the mathematical measurement approach, holding instead that "the rule that chance must be the dominant factor is to be taken in the qualitative or causative senses,

[79] *Id.* at 326 ("The constitutional meaning of gambling does not turn on some weighing of skill and chance, but rather on what types of activities are commonly understood to constitute gambling").

[80] *Id.* at 325.

[81] *Id.* at 330.

[82] Levitt, Miles & Rosenfield, *supra* note 1, at 606.

rather than the quantitative sense."[83] The qualitative approach looks at whether "skill override[s] the effect of the chance."[84] Under that analysis, evidence that poker is influenced by skill is discarded because no level of skill can overcome the fact that there is some element of chance inherent in the game. The North Carolina Supreme Court explained in 1892:

> It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience or intelligence of the gamesters engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.[85]

A Pennsylvania court acknowledged that "skill can determine the outcome in a poker game," but still held that, under the predominant factor test, chance dominated because, "players are still subject to defeat at the turn of the cards."[86] A different court, still claiming to apply a

[83] Minges v. City of Birmingham, 36 So. 2d 93, 96 (Ala. 1948) (quoting 34 Am. Jur. *Lotteries* § 6 (1941)) (holding that a marketing scheme that required entrants to write in with reasons they liked Pepsi-Cola was not a lottery). *See also*, Sherwood & Roberts-Yakima, Inc. v. Leach, 409 P.2d 160, 163 (Wash. 1965) ("The measure is a qualitative one; that is, the chance must be an integral part which influences the result. The measure is not the quantitative proportion of skill and chance in viewing the scheme as a whole."); State ex Inf. McKittrick v. Globe-Democrat Publ'g Co., 110 S.W.2d 705, 717 (Mo. 1937) (en banc) ("[T]he question was not to be determined on the basis of mere proportions of skill and chance entering in the contest as a whole").

[84] State ex. rel. Tyson v. Ted's Game Enters., 893 So. 2d 355, 374 (Ala. Civ. App. 2002) (asking if skill may "destroy the existence or effect of the chance? [If not], it can hardly be said that the skill predominates over the chance in the qualitative or causative sense contemplated").

[85] Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626, 630 (N.C. Ct. App. 2007) (quoting State v. Taylor, 16 S.E. 168, 169 (N.C. 1892)).

[86] Commonwealth v. Dent, 992 A.2d 190, 196 (Pa. Super. Ct. 2010) (overturning the trial court's dismissal of charges based on its finding that, because skill predominated over chance, Texas Hold'em Poker was not unlawful gambling under the statute). The Superior Court compounded its logical confusion by relying on Two Electronic Poker Game Machines, 465 A.2d 973 (Pa. 1983). In *Dent*, the Superior Court ignored the language in *Two Electronic Poker Game Machines* distinguishing between video poker terminals played with losing odds against the house and poker games played against other opponents, where skills like holding, folding, bluffing and raising "can indeed determine the outcome of a game." *Id.* at 978.

predominance inquiry, reached the same conclusion by looking at the "instrumentalities" of the game. It distinguished between poker and games like bowling, billiards, and chess, which are subject to chance occurrences but where, "the instrumentality for victory is in each player's hands and his fortunes will be determined by how skillfully he uses that instrumentality."[87] In poker, "[n]o amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player's hand."[88]

In contrast to these qualitative approaches, where the Colorado Attorney General applied a more quantitative version of the "chance dominant" test, she found that "poker is probably not a lottery because skill plays a larger, perhaps dominant role."[89]

2. Courts Use a Single Hand as the Unit of Analysis

Another significant way that courts misanalyze poker under the dominant factor standard is by evaluating the impact that chance and skill have on the outcome of a single round of play. The analysis of a single hand has limited relevance to the activity at issue in each case, because nobody outside of the courts conceptualizes poker as a single round.[90] Nearly all activities, when broken into their smallest units, show considerable variance due to the presence of chance. Stock traders analyze success on the basis of a portfolio, not a single trade. Sports teams play more than one game a season to determine who makes the playoffs. And poker players evaluate wins and losses across hundreds or thousands of hands.[91]

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[87] *Joker Club*, 643 S.E.2d at 630.

[88] *Id.*

[89] Colo. Op. Att'y Gen. No 93-5 (Apr. 21, 1993), 1993 WL 380757, at *3. The Colorado Attorney General responded to an inquiry posed by a state representative asking whether the state constitution prohibited the General Assembly from enacting legislation to legalize gambling. The response said that lotteries and blackjack were impermissible lotteries under the Colorado Constitution, but poker was not. Thus, "legislative authorization of certain forms of poker would not be prohibited." *Id.* at *5.

[90] Levitt, Miles & Rosenfield, *supra* note 1, at 597.

[91] *But see* U.S. v. DiCristina, 886 F.Supp.2d 164, 178 (E.D.N.Y. 2012) (quoting Gov't Expert *Daubert* Hr'g Tr. 27:12-18). The government's expert witness argued that a single hand is the appropriate standard of measure because a player could get lucky and win a large amount in a single hand and then quit, leaving the losing player without the opportunity to win back his money. "You can drop out any time you want. So the fact that if you play one hand chance is the material

The unit of analysis is particularly important in poker and other card games because the influence of skill "becomes observable only after multiple rounds of play."[92] Starting hand value, which is determined entirely by chance, is important to one's likelihood of winning a particular deal. Skilled players fold most of their starting hands, meaning that by exercising their skill, they forfeit the ability to win that hand in favor of improving their performance in a larger sequence. Over time, variance evens out differences in starting hand value, allowing skilled players to "pick their spots" to capitalize on their talent. The ability to read opponents and exploit one's own image also develops over many hands.[93] By confining analysis to a single hand, courts eliminate the influence of the very skills they are supposed to be weighing.

In the case of poker tournaments, a single hand has no value as a unit of measurement. Participants pay an entry fee, for which they receive a set amount of tournament chips. Tournament chips have no monetary value and cannot be exchanged for cash. Prizes are awarded based on the order in which players are knocked out of the tournament by losing all of their chips. The only opportunity to convert one's entry fee into a prize is to be successful over a substantial sequence of hands. The earliest case to address Texas Hold'em involved this style of tournament, yet the court still treated a single hand as the relevant unit of analysis.[94] A dissenting justice vehemently disagreed, calling the State's argument that poker is a game of pure chance a "canard."[95] He argued that the court should evaluate the influence of skill on the tournament as a whole, stressing that tournament chips were valueless.[96]

Courts have consistently discounted evidence that shows poker is a skill game over a large sample size in favor of analysis based on one hand. For example, the Court of Appeals of North

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decider, I would say that says it right there." *Id.* This argument fails in the case of poker tournaments, where the chips on the table have no monetary value, and thus, a lucky player does not have the option of leaving after a winning hand and taking his earnings with him. By the rules of the game, a player cannot drop out anytime he wants.

[92] Levitt, Miles & Rosenfield, *supra* note 1, at 597.

[93] *Id.* at 605–06.

[94] People v. Mitchell, 444 N.E.2d 1153 (Ill. App. Ct. 1983).

[95] *Id.* at 1157 (Heiple, J., dissenting).

[96] *Id.*

Carolina heard four expert witnesses testify that poker was a game of skill.[97] On the other side, a North Carolina Alcohol Law Enforcement officer testified for the state "that he had seen a television poker tournament in which a hand with a 91% chance to win lost to a hand with only a 9% chance to win."[98] Based on the testimonies, the court said, "All witnesses appeared to agree that in a single hand, chance may predominate over skill, but that over a long game, the most skilled players would likely amass the most chips."[99] Despite agreement that skill predominated over the long run, the court found that poker was a game of chance in violation of the state statute.[100]

III. Poker Is a Skill Game When the Dominant Factor Standard Is Applied Correctly

Historically, courts applying the dominant factor test to poker were confined to analysis based on the qualitative assertions of expert witnesses about the role skill and luck played in the outcome of the game.[101] It is perhaps understandable, given the lack of quantitative evidence available, that judges were swayed by gut feelings or societal impressions that poker should be considered gambling. However, since the advent of online poker enabled the recording and analysis of millions of hands at a time, there is an abundance of statistical proof to support the assertion that poker is a game dominated by skill.[102] If courts apply the dominant factor test

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[97] The plaintiff, seeking a declaratory judgment that poker was a game of skill and not in violation of state law, called as witnesses two professional poker players, a consultant who ran poker tournaments, and a casino manager. Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626 (N.C. Ct. App. 2007).

[98] *Id.* at 629.

[99] *Id.*

[100] *Id.* at 630.

[101] *See, e.g.*, *id. Cf.* Steven D. Levitt & Thomas J. Miles, *The Role of Skill Versus Luck in Poker: Evidence from the World Series of Poker*, 15 J. SPORTS ECON. 1, 31 (2014) (providing quantitative analysis of live poker tournaments).

[102] *See, e.g.*, Levitt, Miles & Rosenfield, *supra* note 1, at 617–35; U.S. v. Dicristina, 886 F. Supp. 2d 164, 178 (E.D.N.Y. 2012). See *also* Robert C. Hannum & Anthony N. Cabot, *Toward Legalization of Poker: The Skill vs. Chance* Debate, 13 UNLV GAMING RESEARCH & REV. J. 1, 1 (2009) (demonstrating the skill level inherent in poker through computer simulations rather than data from online poker hands); Michael A. Dedonno & Douglas K. Detterman, *Poker Is a Skill*, 12 GAMING L. REV. 1, 31 (2008) (same).

correctly, by using quantitative proof and considering a time horizon of many rounds of play, the clear result is that poker is a skill game.

One district court applied the test appropriately and determined that Texas Hold'em was a game of skill under applicable federal law.[103] Defendant Lawrence DiCristina[104] was arrested for operating a semiweekly poker game out of his electric bicycle workshop in Staten Island, New York, and charged with violating the IGBA.[105] Judge Jack Weinstein, known for his innovative thinking, held that to be guilty of a violation of the IGBA, one must have both violated state gambling law and operated a "gambling business" as defined by federal law.[106] The federal definition of gambling, according to Judge Weinstein, was limited to games of chance under the dominant factor test.[107] After detailed consideration of statistical evidence, Judge Weinstein determined that poker was a game of skill and reversed DiCristina's trial court conviction for operating a gambling business.[108]

The Second Circuit Court of Appeals reversed the ruling on the ground that the IGBA only required a violation of state gambling law, and as Judge Weinstein agreed, poker was illegal under

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[103] *Dicristina*, 886 F. Supp. 2d.

[104] The district court case is styled "U.S. v. Dicristina" and spells the defendant's name "Dicristina" in the text of the opinion. The Second Circuit case is styled "U.S. v. DiCristina" and spells his name "DiCristina." This Note will use "Dicristina" to refer to the district court case and "DiCristina" to refer to the appellate case and the defendant.

[105] Petition for Writ of Certiorari, DiCristina v. United States, 2013 WL 5936540, at *7 (Nov. 4, 2013).

[106] *Dicristina*, 886 F. Supp. 2d. at 221–24.

[107] *Id.* at 226–30.

[108] *Id.* at 230–34. Judge Weinstein was clear that, while poker was not gambling under the dominant factor test used by federal law, it was illegal gambling under New York law because he said the state used the more restrictive material factor test. *Id.* at 234. A recent New York Court of Appeals decision about fantasy sports, White v. Cuomo, 192 N.E.3d 300 (N.Y. 2022), held that, despite statutory language implying otherwise, the state applied the dominant factor test. *See also* Jonathan Hilton, *Refusing to Fold: How Lawrence DiCristina Went Bust Fighting for a Novel Interpretation of the Illegal Gambling Business Act*, 83 U. CIN. L. REV. 1467 (2015) (analyzing and critiquing the *Dicristina* case); Ashleigh N. Renfro, *All In with Jack High: Dicristina as the Final Surge to Federally Legalize Online Texas Hold'em Poker*, 1 TEX. A&M L. REV. 751 (2014) (discussing the potential impact of the *Dicristina* decision).

New York penal statute.[109] The Second Circuit did not reach the issue of whether skill or chance predominates in poker. Although the decision did not stand, Judge Weinstein's opinion in *United States v. Dicristina* remains the blueprint for a proper analysis under the dominant factor test.

A full review of the voluminous statistical literature about the influence of skill in poker is beyond the scope of this Note, but it is important to understand conceptually the depth of skill involved in being a winning player and the strength of the quantifiable proof available. This section will discuss some of the factors that winning players consider during a hand in the context of the analysis presented to the *Dicristina* court that led Judge Weinstein to find that poker is predominantly a skill game.

Dr. Randal D. Heeb, an economist and statistician, testified as expert witness for the defendant in *United States v. Dicristina*. Before describing his mathematical research in detail, he illustrated for the court the number of distinct strategic choices a poker player makes in the course of playing a single hand.[110] Each round begins with players being dealt two "hole cards."[111] The most important decision is whether to play the particular hand dealt or fold before committing additional money to the pot.[112] In making just that initial decision, a player must consider the value and suit of the cards themselves,[113] his position at the table,[114] the amount of chips in front of him

[109] United States v. DiCristina, 726 F.3d 92 (2d Cir. 2013).

[110] *Dicristina,* 886 F. Supp. 2d. at 173–74. Heeb focused his analysis on one variant of the game, Texas Hold'em, but his conclusions can be extrapolated to other forms of poker as well.

[111] For a detailed explanation of Texas Hold'em gameplay, see *id.* at 172–73.

[112] *See* Dedonno & Detterman, *supra* note 102 (finding that teaching subjects about choosing starting hands more selectively had the greatest impact on improving player performance over a control group); Levitt, Miles & Rosenfield, *supra* note 1, at 629 (discussing the strong negative correlation between percentage of hands played and average win rate); *Id.* at 635 (explaining the impact of hole cards on the average player's chances of winning with those cards).

[113] Certain starting hands are statistically more likely to win. Heeb gives the example of a hand containing a King and a Nine, which both seem like high cards, but a more skilled player will understand that it is the type of hand that wins small pots and loses big ones.

[114] Betting occurs in an order that rotates each hand. The person to act last has the most information and can make the best decisions, so skilled players will play a wider range of hands, and play them more aggressively, when in later positions, while they play fewer hands when in earlier positions.

and his opponents,[115] the actions taken by the players who choose to call, raise, or fold before his turn,[116] and the number and relative skill levels of the players who remain in the hand.[117]

Heeb also explains bluffing, a skill essential to the arsenal of a talented poker player, but also a conceptually significant occurrence, because the goal of a bluff is to win the pot by convincing players with better hands to fold. Winning via bluffing cannot be about the luck of the draw because the cards the victorious player was dealt were not winners. Thus, the outcome of the hand must be based on the relative skill levels of the bluffing player and the player(s) who did not catch the bluff.[118] One study based on millions of hands of online poker found that at a typical nine-handed Texas Hold'em table, the hand with the actual highest value if the round were played to completion only won the pot thirty-one percent of the time.[119] Another study conducted on 103 million hands of online poker found that only twenty-four percent of hands reached showdown, meaning that seventy-six percent of the time, a player won by inducing the rest of the table to fold.

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[115] For example, good players understand that the value of drawing hands (cards that are sequential in rank or share a suit and will need to improve with community cards, only available after subsequent rounds of betting, to make a straight or flush) will be worthless most of the time and extremely valuable when they hit. In order to capitalize on that value, the player must have enough chips on the table to be matched by other players, who also must have enough chips to cover big bets. If a player expects his hand to pay off once every twenty times, the player must believe he can win more than twenty times the cost of playing the hand in order to make money in the long run.

[116] If players who act before the skilled player's turn have demonstrated strong hands, he will be less likely to invest in a weak hand, unless he thinks he can bluff by showing increased strength through his willingness to continue in the hand after others' shows of strength.

[117] The strength of various starting hands changes depending on the number of opponents it must beat. And a skilled player always takes into account the skill level and playing style of the players still in the hand.

[118] *But see* Dr. DeRosa, the government's expert witness in *Dicristina*, made the case that bluffing was also luck-based because it was out of the winning player's control whether or not the superior hand(s) folded. "Every decision a player makes is a reaction to a chance event (the random distribution of cards) or another player's reaction to a chance event over which the player has no control." *Dicristina,* 886 F. Supp. 2d. at 194 (quoting Gov't Reply Letter at 6).

[119] Levitt, Miles & Rosenfield, *supra* note 1, at 622.

In roughly half of the hands played to completion, the would-be winner had already folded, leaving the pot to the most skilled player rather than the luckiest.[120]

Heeb studied 415 million hands of No Limit Texas Hold'em played online at PokerStars between April 2010 and March 2011.[121] He conducted two different analyses, first investigating whether a player's average win rate across all the hands he played could predict his success when dealt particular hole cards in order to control for the influence of the luck of the deal on the likelihood of winning.[122] He determined that a player's overall success rate "had a statistically significant effect on the amount of money won or lost in a particular hand in poker."[123]

Second, Heeb randomly divided the entire set of players represented in the data set into two groups. With the first group, he used regression analysis to construct a "skill index" that included 240 aspects of players' behavior that related to win rate. He then applied the skill index to the second group of players to determine whether players who the index deemed to be highly skilled based on their behavior performed better than players deemed to be of low skill.[124] Heeb's analysis found that "[t]he lowest skill players according to the predicted skill index in fact achieve much worse results. Average players still don't do very well. Very good players are winning players."[125]

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[120] Hannum & Cabot, *supra* note 102, at 6.

[121] While most research is conducted about online poker because of the availability of aggregate data, the results can be extrapolated to live poker. Online poker emphasizes the mathematical processing and pattern recognition aspects of poker skill in the absence of physical and facial cues. "The game is a game of skill in exactly the same way, whether it's played live or played over the internet…The only difference…is that the live game brings in some additional elements of skill which are not available to the internet player." *Dicristina,* 886 F. Supp. 2d. at 179 (quoting Def. Expert *Daubert* Hr'g Tr. 41:13-24).

[122] *Id.* at 179.

[123] *Id.* at 181.

[124] *Id.* at 182.

[125] *Id.* (quoting Def. Expert *Daubert* Hr'g Tr. 33:7-10). Over around 880 hands of poker, the high skill group predominated over the low skill group with ninety percent confidence. Analysis of around 1400 hands was required to reach ninety-five percent confidence. According to Heeb, that many hands is "quite reasonably played in a relatively short amount of time by players that are playing poker seriously." *Id.* at 184 (quoting Def. Expert *Daubert* Hr'g Tr. 34:19-23). He estimated

The government countered Heeb with their own expert witness, econometrician Dr. David DeRosa, who testified that he had no personal experience playing or analyzing poker.[126] DeRosa's primary argument was that so few players win money, skill cannot predominate over luck.[127] While it is true that not all of the players rated as skilled in Heeb's study made enough money to beat the rake charged by the site to play,[128] DeRosa's argument does not hold water.[129] By definition, half of the players in a game of chess are losers, but that does not detract from the skill level inherent in the game. Olympians are the highest skill level in their fields, but only three win prizes. Millions of golfers spend thousands of dollars on equipment, greens fees, and coaching, but they do not expect to turn pro. Many of those who reach the level of playing professionally on the PGA Tour do not make enough money to cover their costs. Yet no one would argue that they are not skilled players or that the game itself does not involve skill.[130]

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that it would take around 30 hours of live play to reach 880 hands, roughly the same number of hours of the average three-day World Series of Poker tournament. Hands are played much faster online, and skilled players frequently play ten or more tables at once, so it takes a much shorter amount of time online to reach the number of hands at which skill is statistically ensured to predominate.

[126] *Id.* at 185.

[127] *Id.* (quoting Gov't Expert *Daubert* Hr'g Tr. 9:7-17) ("I go in with a certain amount of money, and I leave with more money. And if I don't do that, I am a loser. I'm a loser. So a lot of this ranking stuff is irrelevant because skill should be winning money").

[128] When the rake, the percentage of each pot taken by the website as a fee, was added back to players winnings, thirty-seven percent of players in Heeb's data set showed a positive profit. *Id.* In another study, one in six players was profitable without controlling for the rake. Levitt, Miles & Rosenfield, *supra* note 1, at 624.

[129] The argument does, however, highlight the important distinction between house-banked games, where over time, the odds are set to make it impossible to win money from the game operator, and games like poker played against other opponents. *See, e.g.*, Op. of the Justices, 795 So. 2d 630, 642 (Ala. 2001) (stressing that in the video lottery terminal in question, while skill could minimize one's losses, "even the most skilled player will, over time, be unsuccessful in winning more money than he or she has wagered").

[130] *See* Rachel Croson, Peter Fishman, & Devin G. Pope, *Poker Superstars: Skill or Luck? Similarities Between Golf—Thought to be a Game of Skill—and Poker*, 21 Chance 4 (2008) (concluding that poker is as much a game of skill as golf and drawing parallels between the level of dominance of top golf and poker professionals).

DeRosa's second argument was that the proper unit of measurement should be a single hand,[131] but as discussed previously, that demonstrates a misunderstanding of poker in particular and of games in general. Heeb explains that baseball is a game of skill on every pitch, but it would not be possible to determine from a single pitch, or even a single game, which team is statistically the most skilled.[132] Skill becomes more apparent the longer a season goes, the more games that are played, the more pitches thrown or at bats taken. "But it's a skillful act in the execution of just one swing or pitch."[133] Similarly, with poker, each hand is an exercise of skill, "[b]ut to say that we have shown that with statistical certainty requires more and more information the more precisely we want to measure it."[134]

Steven Levitt, Thomas Miles, and Andrew Rosenfield developed four tests to objectively establish the influence of skill in any particular activity:

> (1) Can one reject the null hypothesis that all players have the same expected payoff when playing the game?
> (2) Are there predetermined observable characteristics about players that help to predict payoffs?
> (3) Do actions taken by players during the game have statistically significant impacts on the payoffs they achieve?
> (4) Are player returns correlated over time, implying persistence in skill?[135]

Their research, as well as Heeb's, definitively answers "yes" to each question at statistically significant levels.[136] While it is beyond mathematical doubt that skill influences poker outcomes, it is impossible to quantify an exact percentage of that influence. Still, the data is strong enough to meet the dominant factor test's requirement that skill account for at least fifty-one percent of a game's result. After analyzing player win rates over a several thousand hands, Levitt, Miles, and Rosenfield determined that "[l]uck in hole cards is not an important factor in determining player

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[131] *Dicristina,* 886 F. Supp. 2d. at 186.

[132] *Id.* at 191.

[133] *Id.* at 192.

[134] *Id.* at 191 (quoting Def. Expert Supp. Report).

[135] Levitt, Miles & Rosenfield, *supra* note 1, at 619.

[136] *Id. at* 617–35.; *Dicristina,* 886 F. Supp. 2d. at 171–98.

outcomes."[137] Given an appropriately large time horizon, "it is almost inconceivable that luck could be the predominant determinant of outcomes…."[138]

IV. Legal Landscape for Gaming Has Changed in Favor of Regulation

Protecting Americans from the moral and social evil of gambling was once a logical reason for courts to distort the dominant factor test to maintain poker's status as a vilified, and thus illegal, game. However, the country has shifted away from a puritanical approach to gambling and toward a policy of regulation and taxation. It does not make sense for courts to treat poker as uniquely dangerous while states rush to legalize sports betting. In addition, the favorable treatment courts have given to daily fantasy sports highlights the need to approach poker as a skill game. Widespread fantasy sports legislation also demonstrates that states are capable of regulating games that involve an element of chance in a way that protects underage and at-risk participants and could be replicated to regulate online poker.

A. Moralization and Paternalism Are No Longer Adequate Justifications for a Prohibition on Poker

The societal conception of the evils of many activities and lifestyle choices has changed over time. Gaming is no exception. In 1900, a habeas corpus petitioner was jailed "on charge of playing baseball on Sunday."[139] It required a Missouri Supreme Court decision to determine that baseball was not a game of chance, and the law forbidding "playing at cards or games of any kind" on Sundays only applied to "games of chance or other games of an immoral tendency."[140] In 1964, a woman filed a habeas corpus petition after being jailed for "permitting a game of bridge to be played."[141] The California Supreme Court held that she had not violated the law because bridge

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[137] Levitt, Miles & Rosenfield, *supra* note 1, at 635.

[138] *Id.*

[139] Ex parte Neet, 57 S.W. 1025, 1026 (Mo. 1900)

[140] *Id. See also* State v. Prather, 100 P. 57 (Kan. 1909) (holding that playing baseball on Sunday did not violate a similar law).

[141] In re Allen, 377 P.2d 280 (Cal. 1962).

was a skill game.[142] It is conceivable that decades from now, criminalizing poker will seem as ridiculous as state prohibitions on baseball and bridge.

In the nineteenth and early twentieth century, judicial language about gambling prohibition focused on the immorality of earning something for nothing. Early court cases about games of chance demonstrate "a theme associating gambling with idleness, corruption, moral decay, and exploitation of the weak and poor."[143] The Supreme Court of Ohio wrote in 1905, "[a]ll highly civilized people recognize the evils to society arising from the encouragement of the gambling spirit, and it is for the purpose of discouraging this vice and preventing the spread of it that laws are passed … to punish and prohibit."[144] The North Carolina Supreme Court described the gambling spirit as "the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing."[145]

Over the last century, courts have shifted language from justifying their rulings because of inherent immorality of certain games to focusing on the presence of chance. Yet the distorted application of the dominant factor test to make it overly restrictive has been designed to achieve the same end—protect society from playing games historically considered immoral.[146] However, this holdover no longer makes sense because society has stopped viewing gambling as immoral. The New York Court of Appeals recognized this shift in a 2022 case, writing that the "public does not consider authorized gambling a violation of some prevalent conception of good morals [or], some deep-rooted tradition of the common weal."[147]

In addition to anachronistic concerns about morality, courts are worried about protecting citizens from the dangers of "criminal activity and undesirable social behavior correlated with

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[142] *Id.*

[143] Towfigh, Glöckner & Reid, *supra* note 49, at 153.

[144] Stevens v. Cincinnati-Times Star Co., 73 N.E. 1058, 1062 (Ohio 1905).

[145] State v. Lipkin, 84 S.E. 340, 343 (N.C. 1915).

[146] Levitt, Miles & Rosenfield, *supra* note 1, at 610–12.

[147] White v. Cuomo, 192 N.E.3d 300, 309 (N.Y. 2022) (internal quotation omitted).

gambling."[148] Gambling addiction is a modern understanding of the gambling spirit.[149] Problem gambling is a serious issue,[150] and experts caution that online gambling increases access for pathological gamblers.[151] One study argues that games like poker and sports betting are more dangerous than pure lotteries because they provide players with a sense of control over the outcome that encourages them to overestimate their chances of winning.[152]

But a paternalistic approach to gambling addiction involving the prohibition of games with any element of chance does not make sense. The incidence of alcoholism is greater than pathological gambling, and yet no state outlaws alcohol.[153] Shopaholics have greater access to stores through the proliferation of online shopping, but they are expected to police themselves without even the protections available to gambling addicts like self-exclusion and age verification.[154]

Most importantly, there is a lack of logical consistency between courts' efforts to restrict skill games in order to protect people from societal harms while states have drastically liberalized their gambling policies in the last decade. Regardless of whether gambling prohibition was based on a desire to protect Americans from the corruption of their souls or from the harms of gambling addiction, the trend has been toward legalization and regulation and away from blanket

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[148] Towfigh, Glöckner & Reid, *supra* note 49, at 157. These undesirable social effects include "loss of interest in family and friends, increased incidents of divorce, and abdication of familial support…." *Id.*

[149] Levitt, Levitt, Miles & Rosenfield, *supra* note 1, at 609.

[150] Problem gambling has been linked to increased rates of child abuse, criminal activity, homelessness, and suicide. Towfigh, Glöckner & Reid, *supra* note 49, at 157.

[151] Holden & Edelman, *supra* note *12*, at 937.

[152] The authors advocate abandoning the dominant factor test because "distinguishing between games of chance and games of skill is not suitable for differentiating between dangerous and harmless games." Towfigh, Glöckner & Reid, *supra* note 49, at 185–86. They acknowledge that stock trading exhibits the same concerning qualities. *Id.* at 182.

[153] Dallis Nicole Warshaw, *Breaking the Bank: The Tax Benefits of Legalizing Online Gambling*, 18 CHAP. L. REV. 289, 308–09 (2014).

[154] *Id.*

prohibition.[155] The result of the current framework of gambling law and regulation is "a public policy position that seems to assert that gambling is bad/illegal, except when it is not."[156]

The evolving attitude toward gambling can be seen most strikingly in the area of sports betting. In 1992, then-NFL Commissioner Paul Tagliabue urged Congress to pass the Professional and Amateur Sports Protection Act (PASPA), freezing state sports betting prohibitions in place so that no new states could legalize wagering on sports.[157] Tagliabue feared that "[w]ith legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing."[158] All major league sports strongly opposed the proliferation of sports betting.

In May 2018, the Supreme Court invalidated PASPA on the ground that it violated the Tenth Amendment of the United States Constitution.[159] The decision returned to states the ability to make their own choices about the legality of sports betting. Before the end of the year, more than twenty states had already introduced legislation to legalize some variety of sports betting.[160] By 2022, thirty states and the District of Columbia had passed some form of sports betting legislation and another nine states were in the process of legalization.[161] Now every major league

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[155] *See, e.g.*, Dew-Becker v. Wu, 178 N.E.3d 1034, 1039 (Ill. 2020) (discussing the trend in Illinois toward more relaxed gambling laws).

[156] Elizabeth Steyngrob, *Real Liabilities for Fantasy Sports: The Modern Inadequacies of Our Archaic Legal Framework*, 18 U. Pa. J. Bus. L. 1207, 1230 (2016).

[157] At the time, only Nevada allowed betting in sports books. Sports-themed lotteries were permitted in Oregon, Delaware, and Montana. New Jersey was given a year after the passage of PASPA to legalize sports betting but chose not to do so. 18 U.S.C. § 3701 *et seq.*

[158] Christopher Soriano, *supra* note 10, at 638 (citing Amateur Sports Protection Act, S. 474, 106 Stat. 4227 (1992)).

[159] *Murphy v. National Collegiate Athletic Association*, 1138 S. Ct. 1461 (2018). The Supreme Court held that Congress does have the right to regulate sports betting on a national level but cannot mandate the way that states legislate it.

[160] Holden & Edelman, *supra* note 12, at 932.

[161] Ward Williams, *Sports Betting Laws by State*, INVESTOPEDIA (Nov. 09, 2022), https://www.investopedia.com/sports-betting-laws-by-state-5219064#:~:text=According%20to%20the%20American%20Gaming,or%20online%20and%20mobile%20sportsbooks.

sport has official betting partnerships, advertisements for sports books appear during nearly every commercial break of televised sporting events, and betting lines have become a staple of game coverage.[162] So far, doomsday predictions about the erosion of the integrity of athletics sure to be caused by the spread of sports betting have failed to come to fruition.

With the nationwide explosion in legalized and regulated gambling, it no longer makes sense for courts to adhere to anachronistic notions of the immorality of gambling or to use fears about problem gambling as a rationale for applying an illogically restrictive version of the dominant factor test to poker. While courts at one time could have had legitimate concerns that branding poker a skill game would turn it loose into an unregulatable world, the rapid proliferation of sports betting has demonstrated that states are willing and able to establish regulatory systems to protect players and to capitalize on revenue.

B. Treatment of Daily Fantasy Sports Markedly Different than Poker

Judicial insistence on treating poker as illegal gambling makes even less sense in light of the rapid proliferation of daily fantasy sports (DFS), which has been treated as a game of skill despite arguably depending more on luck than does poker.[163] In traditional fantasy sports, participants build rosters of players from different real-life teams in an effort to create the strongest possible team subject to the restrictions of the particular fantasy league. Results "are premised on an aggregation of statistics concerning each individual athlete's performance on specific tasks, and … pit the rosters of participants against one another rather than tying success to the outcome of sporting events."[164] DFS allows competitors to pay entry fees to win prizes awarded for building winning fantasy sports rosters in contests that last between a single day and a week rather than an entire season.

DFS appeared on the national scene in the late 2000s, a decade before *Murphy v. NCAA* allowed states to legalize traditional sports betting.[165] The UIGEA, passed in 2006, effectively shut

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[162] Holden & Edelman, *supra* note 12, at 965–66.

[163] *See generally* John J. Chung, *The Legality of Online Daily Fantasy Sports Versus the Illegality of Online Poker*, 27 ROGER WILLIAMS U. L. REV. 1 (2022).

[164] White v. Cuomo, 192 N.E.3d 300, 305 (2022) (describing in detail the game play of what the court calls interactive fantasy sports (IFS)).

[165] 1138 S. Ct. 1461 (2018).

down many online poker sites in the United States. The statute contained an express carve out for fantasy sports,[166] giving poker blogger Kevin Bonnet the idea to develop a product that felt like a cross between sports betting and a poker tournament but arguably fell within the UIGEA's fantasy sports exemption.[167] Bonnet never achieved commercial success, but other poker players founded two companies based on the DFS idea that went on to be enormously profitable: FanDuel and DraftKings.[168] The two companies have emerged as the clear leaders of the DFS industry, which brought in $350 million in revenue in 2019.[169] Top tournament prizes frequently reach $1 million.[170]

DFS is currently legal to play for prizes in 44 states.[171] Exactly half of those states, prompted by significant lobbying efforts, have passed legislation legalizing and regulating DFS.[172] Others, including California, Massachusetts, and Kansas, have relied on the dominant factor test to establish the legality of DFS.[173] The true influence of luck versus skill in DFS is an open question. Much like poker, DFS fits somewhere on the continuum between a game of pure chance and pure skill. Some argue that it is closer to traditional sports betting, which has always fallen on

[166] 18 U.S.C. § 5362(1)(E)(ix) (excluding "fantasy or simulation sports game[s]" from the definition of a "bet" or "wager").

[167] Marc Edelman, John T. Holden, & Adam Scott Wandt, *U.S. Fantasy Sports Law: Fifteen Years After UIGEA*, 83 Ohio St. L.J. 117, 124–25 (2022).

[168] *Id.* FanDuel was founded in 2009 and DraftKings in 2012. Andrew J. Griffin, *A Fantastic Gamble: An Analysis of Daily Fantasy Sports Under the UIGEA and the Predominance Test*, 23 B.U. J. SCI. & TECH. L. 456, 458 (2017).

[169] Edelman, Holden & Wandt, *supra* note 167, at 126.

[170] Chung, *supra* note 163, at 13.

[171] One can risk money to win prizes on DraftKings.com in all states but Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *Where Can You Play DraftKings Daily Fantasy Sports?,* DraftKings, (March 22, 2023), https://www.draftkings.com/where-is-draftkings-legal?.

[172] Edelman, Holden & Wandt, *supra* note 167, at 128–30, 132.

[173] *Id.* at 129, fn. 92.

the chance side of the dividing line.[174] Others argue that DFS is closer to traditional, season-long fantasy sports,[175] which has always been considered a game of skill.[176]

Several courts have found that DFS is not illegal gambling because it is not a game of chance.[177] In the most recent case, *White v. Cuomo*, petitioners alleged that New York's statute legalizing fantasy sports violated the state constitution's ban on gambling. New York's highest court applied the dominant factor test in support of the legislature's determination that fantasy sports are a skill-based activity.[178] Should other states with broad constitutional bans on gambling choose to legalize poker, courts may be similarly called upon to apply the dominant factor test to uphold the legislation as constitutional on the ground that poker is a game of skill.

The only reason for courts or legislatures to treat poker more harshly than DFS is that DFS did not exist until after the national attitude toward gambling had liberalized. Thus, while there is much precedent for misapplying the dominant factor test to poker to protect citizens from the evils of gambling, no such precedent, or prejudice, exists to bias courts against DFS. Courts should look to the treatment of DFS as a guide for appropriate analysis of the skill inherent in poker.

Further, states have established licensing requirements and regulations that require online DFS providers to undertake age, location, and identity verification as well as to provide problem gambling resources and self-exclusion options.[179] Some states have even required that DFS platforms impose monthly limits on how much players can deposit to prevent overspending.[180]

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[174] Holden & Edelman, *supra* note 12, at 921.

[175] *See generally* Jeffrey C. Meehan, *The Predominant Goliath: Why Pay-to-Play Daily Fantasy Sports Games Are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5 (2015) (arguing that DFS requires the same amount of skill as traditional fantasy sports); Chung *supra* note 163, at 13–19 (explaining the elements of skill and luck involved in DFS without determining which is dominant).

[176] Dew-Becker v. Wu, 178 N.E.3d 1034, 1040 (Ill. 2020).

[177] *Id.*; White v. Cuomo, 192 N.E.3d 300 (2022).

[178] *White*, 192 N.E.3d at 316.

[179] Edelman, Holden & Wandt, *supra* note 167, at 131.

[180] *Id.*

The success of these regulations should provide courts with assurance that similar options are available to allow Americans to safely participate in online poker.

V. The Path Forward: State-by-State Poker Legislation and Inter-State Compacts

For several years after the passage of the UIGEA, hopes were high for a legislative compromise that would allow for the regulation and taxation of poker on a federal level. Between 2009 and 2012, several bills were introduced that would either repeal parts of the UIGEA or strengthen it with respect to other forms of gambling and create a carve out for online poker.[181] The most recent federal bill aimed at legalizing online poker was the Internet Poker Freedom Act of 2013, which would have created the Office of Internet Poker Oversight within the Department of Commerce.[182] None made it out of committee. After his bill failed in 2012, Sen. Reid said that "the chances of legalizing online poker at the federal level are exceedingly slim."[183] No attempts have been made to legalize poker nationally since 2013.

Federal legislation, which would require the ability for states to opt out, is most desirable because online poker websites require a large pool of players to draw from in order to be viable. At its peak, PokerStars and Full Tilt drew hundreds of thousands of players from the entire world and were able to offer games of all varieties and price points twenty-four hours a day. States with small populations which can only draw customers from within their borders have a much more limited player pool and may have difficulty developing a viable product.[184] However, federal legislation is not a realistic option at this time.

The next best option is for states to legalize poker individually and then form compacts to share the regulatory burden and to increase the size of the player pool. Currently, the only online

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[181] For example, in 2009, Rep. Barney Frank (D-MA) introduced the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, which would have banned sports betting online and implemented age protections and anti-money laundering measures. H.R. 2267 (111th). In 2012, Sen. Harry Reid (D-NV) partnered with UIGEA-supporter Sen. Jon Kyl (R-AZ) to propose the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act, which would have reinforced anti-gambling measures but exempt poker and horse racing. Online poker was to be taxed at sixteen percent. Warshaw, *supra* note 153, at 306.

[182] H.R. 2666 (113th).

[183] Warshaw, *supra* note 153, at 307.

[184] Soriano, *supra* note 10, at 648 ("an online poker game can only proceed if there are a sufficient number of players logged in at the same time willing to play at various stakes").

poker compact is the Multi-State Internet Gaming Agreement, formed between Nevada and Delaware and joined by New Jersey and Michigan.[185] States that do choose to legislate the legalization of poker should borrow regulations from DFS and traditional sports books that require sites to verify the ages and identities of their customers and provide assistance to patrons with gambling problems, including hotlines, self-exclusion, and deposit limits.

Courts may be reluctant to act first by accurately applying the dominant factor test to poker before their state legislature passes online poker regulation for fear that designating poker a skill game without a safety net in place would instantly place poker on par with chess and checkers. While ideally legislatures across the country will act swiftly to regulate online poker, some states may require nudging from the courts to overcome political inertia. Because there is now some regulatory framework in place in the majority of states to address online sports betting and DFS, state governments will need less time to establish poker regulations and will be able to react quickly to establish consumer protections. Once poker is found to be beyond a blanket ban, state legislators will quickly step in to provide appropriate regulation and taxation. In states with broad constitutional gambling bans, courts may also be relied upon to determine that poker is a skill game in order to validate state legislation.[186]

Conclusion

Data shows that poker outcomes over time are heavily determined by skill. Historically, courts have misapplied the dominant factor test by overlooking quantitative evidence and by using a single hand as the unit of analysis in order to avoid designating poker as exempt from prohibitions on games of chance. Likely courts have been reluctant to find that poker is a skill game because of a desire to protect citizens from the moral and social harms of gambling, with which poker has long been associated. However, attitudes toward gambling in the United States have changed. The nationwide trend is away from moral disapprobation and toward legalization and regulation. It no longer makes sense to treat poker with undue judicial hostility. Instead, in the vast majority of states where the dominant factor test is the appropriate standard, courts should properly apply it by using quantitative evidence and an adequately large sample size, leading to the unmistakable conclusion that poker game outcomes are more influenced by skill than by chance. Hopefully,

[185] *Id.*

[186] *See* White v. Cuomo, 192 N.E.3d 300 (2022).

more states will also legislate to legalize and regulate poker in keeping with their treatment of daily fantasy sports.

Applicant Details

First Name	**Kathryn**
Middle Initial	**M**
Last Name	**Heller**
Citizenship Status	**U. S. Citizen**
Email Address	**heller.k24@law.wlu.edu**
Address	**Address** Street **10115 Ebenshire Ct** City **Oakton** State/Territory **Virginia** Zip **22124** Country **United States**
Contact Phone Number	**7038886107**

Applicant Education

BA/BS From	**College of William and Mary**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**German Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**John W. Davis Appellate Advocacy Competition** **Mediation Competition** **Robert J. Grey Negotiations Competition** **Mock Trial Competition** **Client Counseling Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hasbrouck, Brandon
bhasbrouck@wlu.edu
Houck, Mona
mhouck@wlu.edu
Acevedo, John
jacevedo@law.ua.edu
773 330-8201

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kathryn Heller
10115 Ebenshire Court, Oakton VA, 22124 | heller.k24@law.wlu.edu | 703-888-6107

June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby St
Norfolk, VA 23510

Dear Judge Walker,

I am a rising 3L at the Washington and Lee University School of Law seeking a clerkship in your chambers for the 2024 term. As a native of Virginia, I have a particular interest in clerking in Norfolk area, because I have ties to the community as a graduate of William & Mary. Additionally, I am committed to a career practicing law in the Commonwealth.

Through my academic and professional pursuits, I have gained the skills necessary to make valuable contributions to your chambers. I have developed strong research and writing skills through participation in a journal, completing a writing project under the direction of a faculty supervisor in a seminar course, and writing an appellate brief for a Moot Court competition. As an editor on the *German Law Journal*, I developed the ability to critically edit and prepare written works for publication. As part of a seminar course, I devoted a semester to conducting legal research on a self-selected topic, writing, and revising that paper in response to feedback from a professor. Furthermore, I have written an appellate brief as part of a Moot Court competition, which required me to conduct legal research on cases from the Supreme Court and federal circuits in order to argue persuasively for a given position.

Thank you for your consideration, and I look forward to hearing from you soon.

Best regards,

Kathryn Heller

Kathryn Heller
10115 Ebenshire Court, Oakton VA, 22124 | heller.k24@law.wlu.edu | 703-888-6107

EDUCATION

Washington and Lee University School of Law, Lexington, VA
Candidate for J.D., May 2024 (GPA: 3.570, top 33%)

- Moot Court: Mock Trial Competition Winner, John W. Davis Appellate Advocacy Competition: Finalist in Oral Advocacy, Finalist in Brief Writing, Robert J. Grey Negotiations Competition: Quarterfinalist, Mediations Competition: Quarterfinalist.
- Journal: German Law Journal (Senior Articles Editor).
- Activities: Moot Court Executive Board (Vice Chair), Public Defense Group, Public Interest Law Students Association, Women Law Students Organization.

College of William & Mary, Williamsburg, VA
B.A., Government, Minor, Public Health, May 2020

- Honors: Dean's List (three terms)
- Activities: Undergraduate Admissions Ambassador, Global Education Ambassador, Academic Excellence and Alumni Relations Chair for Kappa Delta Sorority, Women's Mentoring Program Ambassador, Teaching Assistant at Clara Byrd Baker Elementary School

EXPERIENCE

Criminal Justice Clinic, Lexington, VA
Student Attorney, Aug. 2023- May 2024

Office of the Public Defender for Prince William County, Manassas, VA
Summer Intern, May 2023- Aug. 2023

Office of the Public Defender for Fairfax County, Fairfax, VA
Summer Intern, May 2022– Aug. 2022

- Conducted legal research on the 2021 revised robbery statute in Virginia, admissibility of victim impact statements during sentencing, and constructive possession of firearms during traffic stops.
- Prepared legal documents, including a motion to suppress, motions in limine, preliminary hearing cross-examination questions, and sentencing memorandums.
- Argued motions in limine and motions to suppress during a mock trial with my intern cohort, and wrote and conducted opening statements, cross-examination, direct examination, closing statements and objections.

Patrick N. Anderson & Associates, Alexandria, VA
Legal Assistant (criminal defense firm), Jan– July 2021

- Conducted legal research and prepared memoranda on criminal legal issues on the state and federal level.
- Drafted and edited legal documents, including motions, sentencing memorandums, and appeals.
- Conducted interviews with clients and witnesses, investigated facts, and helped develop case theories and strategies.

Office of the Public Defender for Arlington County, Arlington, VA
Mitigation and Social Work Intern, May 2020 – Dec. 2020

- Conducted legal research on mental health and substance abuse issues in the field of criminal law.
- Conducted mitigation and social interviews with clients and their family members, and gathered relevant information to advocate for appropriate sentences and mental health and substance abuse treatment.
- Reviewed and summarized discovery relating to mental health and substance abuse treatment of clients.

Print Date: 05/24/2023
Page: 1 of 3
Student: Kathryn Marie Heller

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

SSN: XXX-XX-9670 **Entry Date:** 08/30/2021
Date of Birth: 09/09/XXXX **Academic Level:** Law

2021-2022 Law Fall
08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	A-	4.00	4.00	14.68	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 165	LEGAL WRITING I	B+	2.00	2.00	6.66	
LAW 190	TORTS	A-	4.00	4.00	14.68	
	Term GPA: 3.517	**Totals:**	14.50	14.50	51.01	
	Cumulative GPA: 3.517	**Totals:**	14.50	14.50	51.01	

2021-2022 Law Spring
01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	A-	3.00	3.00	11.01	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 166	LEGAL WRITING II	B+	2.00	2.00	6.66	
LAW 179	PROPERTY	B+	4.00	4.00	13.32	
LAW 195	TRANSNATIONAL LAW	A	3.00	3.00	12.00	
	Term GPA: 3.596	**Totals:**	16.50	16.50	59.34	
	Cumulative GPA: 3.559	**Totals:**	31.00	31.00	110.34	

2021-2022 Law Summer
05/22/2022 - 08/13/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	
	Term GPA: 0.000	**Totals:**	1.00	1.00	0.00	
	Cumulative GPA: 3.559	**Totals:**	32.00	32.00	110.34	

Print Date: 05/24/2023
Page: 2 of 3
Student: Kathryn Marie Heller

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

2022-2023 Law Fall
08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 637	Comparative Constitutional Law Seminar	A-	2.00	2.00	7.34	
LAW 656	Critical Race Theory Seminar	A-	2.00	2.00	7.34	
LAW 685	Evidence	A-	3.00	3.00	11.01	
LAW 733	Criminal Procedure: Investigation	A	3.00	3.00	12.00	
LAW 865	Negotiations and Conflict Resolution Practicum	A-	2.00	2.00	7.34	
LAW 969	German Law Journal	CR	1.00	1.00	0.00	
Term GPA: 3.752		**Totals:**	13.00	13.00	45.03	
Cumulative GPA: 3.613		**Totals:**	45.00	45.00	155.37	

2022-2023 Law Spring
01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	B	3.00	3.00	9.00	
LAW 731	Immigration Law	B+	3.00	3.00	9.99	
LAW 765	Criminal Procedure: Adjudication	A-	3.00	3.00	11.01	
LAW 828	Trial Advocacy Practicum	A-	3.00	3.00	11.01	
LAW 916	Appellate Advocacy Competition	CR	1.00	1.00	0.00	
LAW 969	German Law Journal	CR	1.00	1.00	0.00	
Term GPA: 3.417		**Totals:**	14.00	14.00	41.01	
Cumulative GPA: 3.570		**Totals:**	59.00	59.00	196.38	

2023-2024 Law Fall
08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 817	Statutory Interpretation Practicum		4.00	0.00	0.00	
LAW 920	Moot Court Board		1.00	0.00	0.00	
LAW 939	Criminal Justice Clinic		5.00	0.00	0.00	
LAW 969	German Law Journal		1.00	0.00	0.00	
Term GPA: 0.000		**Totals:**	16.00	0.00	0.00	
Cumulative GPA: 3.570		**Totals:**	59.00	59.00	196.38	

Print Date: 05/24/2023
Page: 3 of 3
Student: Kathryn Marie Heller

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	59.00	59.00	3.570
External:	0.00	0.00	
Overall:	59.00	59.00	3.570

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.
The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.
The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commence (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	4.33 prior to Fall 2009
A	4.00	Superior.
A-	3.67	
B+	3.33	
B	3.00	Good.
B-	2.67	
C+	2.33	
C	2.00	Fair.
C-	1.67	
D+	1.33	
D	1.00	Marginal.
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).

E Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 *and* a cumulative GPA of at least 2.000 *and* no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical Grade*	Letter Grade**	Points	Description
4.0	A	4.00	
	A-	3.67	
3.5		3.50	
	B+	3.33	
3.0	B	3.00	
	B-	2.67	
2.5		2.50	
	C+	2.33	
2.0	C	2.00	
	C-	1.67	
1.5		1.50	This grade eliminated after Class of 1990.
	D+	1.33	
1.0	D	1.00	A grade of D or higher in each required course is necessary for graduation.
	D-	0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5		0.50	This grade eliminated after the Class of 1990.
0.0	F	0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.
** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu

University Registrar

220707

William & Mary
Official Transcript

Student No:930940902 Date of Birth: 09-SEP Date Issued: 17-MAY-2023

Record of : Kathryn Marie Heller

Issued To : KATHRYN HELLER

Course Level : Undergraduate

Current Program
Degree : Bachelor of Arts
College : Faculty of Arts and Sciences
Major:
Government
Minor:
Public Health

Degree Information:
Degree Awarded Bachelor of Arts 16-MAY-2020

Earned Hrs	GPA-Hrs	QPts	GPA
140.00	108.00	373.50	3.45

Primary Degree
College : Faculty of Arts and Sciences
Major:
Government
Minor:
Public Health

Subj	No.	Title	Cred	Grade	Pts	R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

May 2016 Internat Baccal Credit

BIOL	ELT	Biology Elective Credit	4.00	T	
ENGL	1XX	Transfer Elective Credit	3.00	T	
FREN	1XX	Transfer Elective Course	3.00	T	
PSYC	201	Intro Psy as a Natural Science	3.00	T	
PSYC	202	Intro Psy as a Social Science	3.00	T	

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	0.00	0.00	0.00

Spring 2019 IES Paris

ARTH	220	History of Paris Architecture	3.00	T	
FREN	299	French Studies Abroad II	4.00	T	
GOVT	391	Media/Politc/Poli Comm US & FR	3.00	T	
GOVT	391	France & the European Union	3.00	T	

Earned Hrs	GPA-Hrs	QPts	GPA
13.00	0.00	0.00	0.00

Subj	No.	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

Fall 2016

ANTH	204	The Study of Language	4.00	C+	9.20
BIOL	150	Emerging Diseases	4.00	B	12.00
GOVT	201	Intro to American Politics	3.00	B	9.00
HIST	211	20th Century World History	3.00	B+	9.90

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	14.00	40.10	2.86

Spring 2017

FREN	210	From Word to Text	3.00	B	9.00

Subj	No.	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

GOVT	203	Intro Comparative Politics	3.00	B+	9.90
KINE	270	Foundations of Epidemiology	3.00	B-	8.10
MATH	106	Elem Probability/Statistics	3.00	B+	9.90
PSYC	100	Interplay of Nature & Nurture	4.00	A-	14.80

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	51.70	3.23

Fall 2017

ECON	101	Principles: Microeconomics	3.00	C-	5.10
FREN	394	Resistance:Modes, Mean, Mthds	3.00	B	9.00
GOVT	204	Intro International Politics	3.00	B	9.00
GOVT	306	Political Parties	3.00	B	9.00
SPCH	201	Public Speaking	3.00	A-	11.10

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	43.20	2.88

Spring 2018

GOVT	301	Research Methods	3.00	B+	9.90
GOVT	305	Contemp Political Theory	3.00	B+	9.90
GOVT	311	European Politics	3.00	A	12.00
INTR	299	Study Abroad Florence	1.00	A	4.00
KINE	280	Intro to Public Health	3.00	B+	9.90
KINE	415	Public Health: Health Equity	3.00	A-	11.10

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	16.00	56.80	3.55

Summer 2018

GOVT	391	Brexit and Politics	3.00	A-	11.10
ITAL	105	Italian Language & Literature	4.00	A	16.00

Earned Hrs	GPA-Hrs	QPts	GPA
7.00	7.00	27.10	3.87

Fall 2018

AMES	385	AMES Student Think Tank	3.00	A-	11.10
GOVT	335	Politics of Eastern Europe	3.00	A-	11.10
GOVT	374	Political Behavior	3.00	A-	11.10
GOVT	394	Directed Research	2.00	A	8.00
SOCL	362	Medical Sociology	3.00	A	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	14.00	53.30	3.80

Dean's List

Fall 2019

GOVT	391	How to Be an Autocrat	3.00	A	12.00
GOVT	394	STAIR Lab	2.00	A	8.00
GOVT	403	Rem. for Conflict in Eurasia	4.00	A	16.00
KINE	200	Intro to the Human Body	3.00	A-	11.10
SOCL	302	Criminology	3.00	P	0.00

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	12.00	47.10	3.92

Dean's List

Spring 2020
Pass/Fail and withdrawal grading were adjusted in Spring 2020 due to the COVID-19 pandemic.

ENGL	200	Lesbian Fiction	3.00	A-	11.10
GOVT	370	Legislative Process	3.00	A	12.00

Sara L. Marchello
University Registrar

William & Mary
Official Transcript

Student No:930940902 Date of Birth: 09-SEP Date Issued: 17-MAY-2023

Subj	No.	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
GOVT	372	American Legal Process	3.00	A	12.00	
GOVT	394	STAIR Lab	2.00	A	8.00	
RELG	215	Religion in East Asia	3.00	A-	11.10	

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	14.00	54.20	3.87

Dean's List

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	111.00	108.00	373.50	3.45
TOTAL TRANSFER	29.00	0.00	0.00	0.00
OVERALL	140.00	108.00	373.50	3.45

----------END OF TRANSCRIPT----------

Sara L. Marchello
University Registrar

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I most enthusiastically recommend Kathryn Heller (Katie) for a judicial clerkship. Katie is not only an extraordinary student—one of the most talented and gifted advocates that I have had the pleasure to teach or work with—but a great person. Katie is a truly impressive young professional that possesses a brilliant mind. Simply put, Katie is a rising star! As background, Katie was a student in my critical race theory seminar.

In my critical race theory seminar (CRT), Katie proved herself to be a gifted thinker and a phenomenal writer. In this course, we identify how law perpetuates racial hierarchies and think deeply how to dismantle these structures through countermeasures—constitutional and legal interpretation, legislative and corporate policy changes, and executive action. This course is rich in its ability to get students proximate to our must vulnerable populations. As you can imagine, CRT is a very challenging course because it requires students to confront unsettling and uncomfortable topics that range from affirmative action to criminal justice transformation to civil rights. The navigation of these broad areas of law demands that we tackle privilege, implicit bias, and the social construction of race. This is a significant undertaking for anyone. Katie not only rose to the occasion but she also demonstrated a profound ability to understand complex areas of the law and suggest possible solutions. This is precisely the work that law clerks must engage in to provide great counsel to their judges. In all of her work, Katie would engage in such powerful storytelling to illuminate problems—such as predatory policing—that directly impacts Black women. She would demonstrate in her oral and written advocacy how intersectionality is an important analytical framework to situate problems that impact Black women who are often forgotten in our political, social, and legal dialogue, from medical decisions, to appearance, to domestic abuse, to employment and so many other spaces.

I want to briefly discuss Katie's final project, which was a tour de force and nothing short of brilliant. Katie did a judicial rewrite of New York State Rifle & Pistol Association v. Bruen, 142 S. Ct. 2111 (2022). While Bruen invokes racial justice without considering the full picture of America's racial injustice in expanding the scope of the Second Amendment, Katie's rewrite does the opposite. Specifically, Katie argues that without serious revisions to Fourth Amendment policing doctrines, Black people will never bear arms the same as white people. In so doing, Katie excavates—and provides some incredible analyses on—the many issues at the intersection of Second and Fourth Amendment jurisprudence. It lays bare that whatever the scope of the Second Amendment, the scope will always be more limited for Black people because of Fourth Amendment doctrine. This paper is a significant piece of scholarship, written at the level of a tenured law professor. More importantly, it is this type of engagement that will deeply benefit any judge grappling with complex issues. In sum, Katie's rewrite was absolutely fantastic and was one of the top two papers written in the class, resulting in the second highest grade.

Katie is also an incredible citizen of our law school. She is the senior articles editor (the editor trusted to select articles for publication) of the German Law Journal—a widely respected international journal in which an invitation to join only follows after a competitive write-on process. Katie also dominated all of our moot court competitions, culminating in a first-place-finish in our mock trial competition! Because of her success in moot court, Katie was selected as the vice chair of the Moot Court Executive Board. On top of all of this, Katie is involved in building a more diverse legal profession, mentoring future law students about law school and our profession.

As a former law clerk to two judges—the Honorable Roger L. Gregory (4th Cir.) and the Honorable Emmet G. Sullivan (DDC)—I, more than most, understand what is expected of a law clerk: trustworthiness, dependability, and excellence. That is Katie. Katie exudes trustworthiness and reliability—she is a real self-starter with an intuitive grasp for what needs to be done and how. Katie is also a person of integrity, perspective, and balance. Reflective and poised, she is always thinking of how to improve, but she also has mettle, confidence, and great tenacity to tackle difficult and thorny legal questions. Katie thrives in interpersonal relations, and would mix respectfully with other law clerks and staff. I would trust her with any work product, no matter how sensitive, and have the utmost confidence that she would always conduct herself with dignity and discretion. More importantly, in my opinion, Katie's compassion and passion separates her from most—she will work tirelessly to ensure that your bench memorandums are well researched and recommend the right result for the right reasons. That is excellence—excellence that she demonstrated throughout her career at Washington and Lee University School of Law.

In sum, I offer Katie my most enthusiastic and unreserved recommendation. She will be an amazing law clerk. It is my sincere hope that she has the opportunity and privilege to work for you, Judge.

Please feel free to reach out to me at bhasbrouck@wlu.edu or 914-443-1324 should you have any questions.

Sincerely,

Brandon Hasbrouck - bhasbrouck@wlu.edu

Brandon Hasbrouck
Associate Professor of Law

Brandon Hasbrouck - bhasbrouck@wlu.edu

MILLER KORZENIK SOMMERS RAYMAN LLP
THE PARAMOUNT BUILDING • 1501 BROADWAY, SUITE 2015 • NEW YORK, NY 10036

June 7, 2023

Dear Judge:

I enthusiastically recommend Kathryn Heller for a clerkship in your chambers. Katie was in my Legal Writing class for the entirety of her first year, allowing me to see her drafting and analysis skills develop, discuss her work with her in detail, and observe her interactions with colleagues working on group projects. I am confident she will be an excellent law clerk.

From the start, Katie was focused and motivated to succeed in every aspect of law school. She quickly built a supportive, collegial rapport with classmates and made consistent and thoughtful contributions to class discussions. She welcomed feedback and deftly incorporated it into subsequent assignments. She had a positive outlook focused on growth, and she sharpened her analytical skills throughout the year. This was especially evident in the year's final assignment, an oral argument based on her excellent appellate brief. She earned one of the highest oral advocacy scores among my very high-achieving 60 students, demonstrating a mastery of the record and the law in a clear and effective presentation that rivaled that of most professional arguments I've observed. The preparation necessary for that level of work was typical of Katie's approach, and I was not surprised—yet still impressed—to see her excel in the school's writing and advocacy competitions the following year. I know this strength in legal reasoning and analysis will serve Katie well in the clerking environment.

Katie also stood out for her generous collaborative spirit. In team feedback reports, students praised her for smoothly guiding the group through projects while genuinely engaging others' views. "Katie was prepared, encouraging, considerate, and flexible," teammates wrote. "She formed opinions, shared them, and listened to others' takes in an encouraging way."

I believe that Katie will make a positive contribution to the legal profession and that you would enjoy working with her in your chambers. Please do not hesitate to contact me via phone (212-380-7858) or email (mhouck@mkslex.com) if I can be of any further assistance.

Sincerely yours,

Mona Houck
Partner, Miller Korzenik Sommers Rayman
Formerly professor of practice at W&L Law